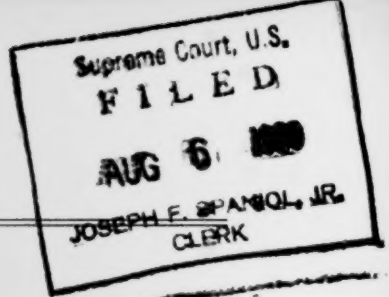


90-2411

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No. _____



In The
Supreme Court of the United States
October Term, 1990

GEORGE G. RHODES,

Petitioner,

vs.

State of Nebraska ex rel
NEBRASKA STATE BAR ASSOCIATION,

Respondent.

Petition for Writ of Certiorari to the
Supreme Court of the State of Nebraska

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the use of an ex post facto disciplinary prosecution to overturn the results of an election and prevent an elected executive official from performing his official duties of office, unconstitutionally operate in derogation of the franchise?

2. Does Article IV, Section 4, prohibit the suspension of the license to practice law, of an elected member of the executive branch for actions taken in performance of his official duties when he complied with existing statutes, case law, and existing interpretations of the Code of Professional Responsibility?

3. May the disciplinary sanction of suspension be imposed against an attorney who is an elected official to prevent him from serving in his official capacity without affording the elected official due process of law?

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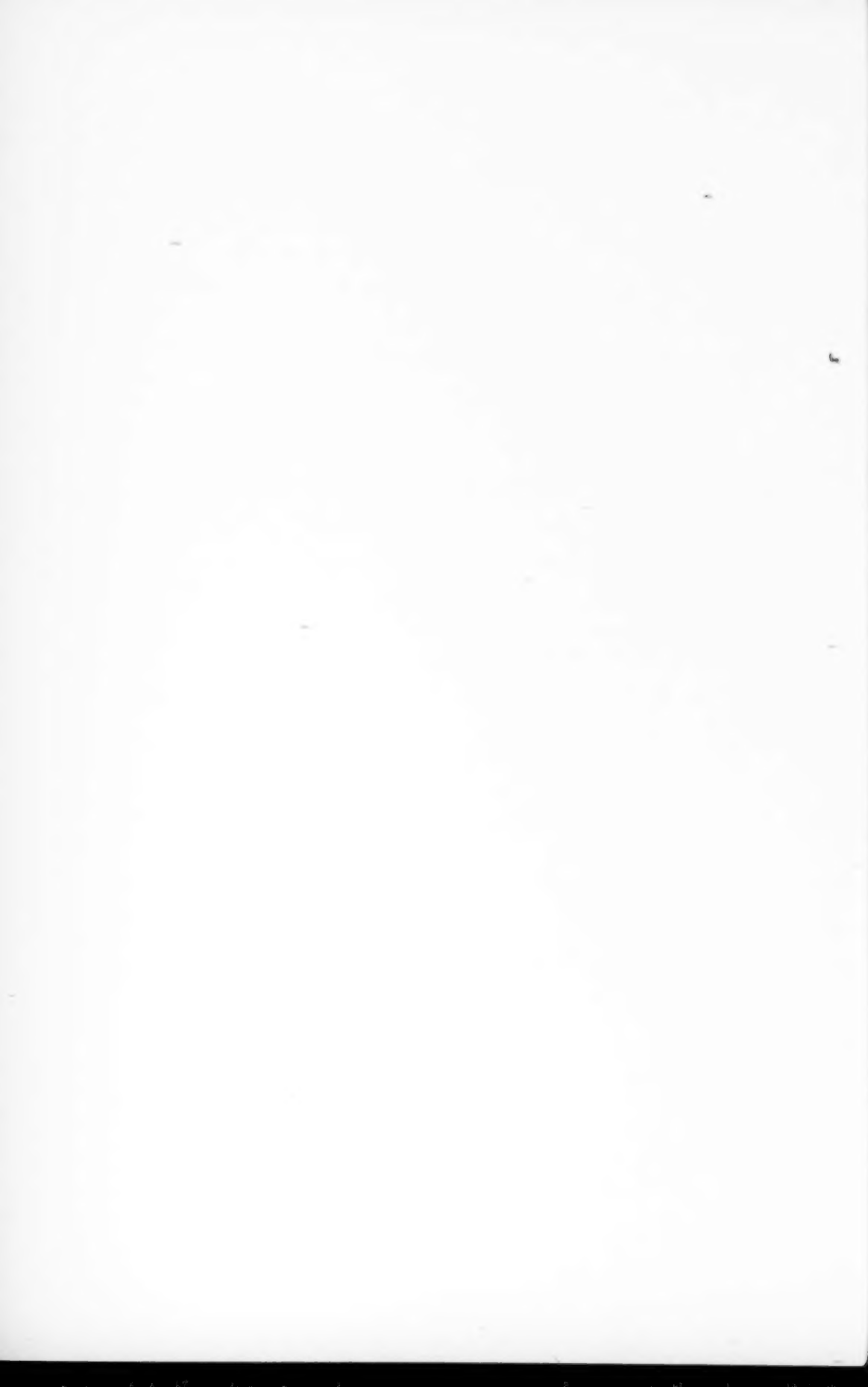
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REFERENCE TO THE REPORTED OPINION

The lower court decision in this case is reported as *State ex rel NSBA v. Rhodes*, 234 Neb. 799, 453 N.W.2d 73, and 90 Nebraska Advance Sheets No. 12, p. 799 (1990).

STATEMENT OF JURISDICTIONAL GROUNDS

This case was an original action in the Nebraska Supreme Court, a state court of last resort, which rendered its decision on March 23, 1990, and Petitioner's motion for rehearing was overruled by the state court on May 9, 1990. The United States Supreme Court has jurisdiction to review the judgment pursuant to 28 USCA § 1257, as the case involves rights, privileges and immunities claimed under the United States Constitution.

CONSTITUTIONAL PROVISIONS

This case involves Article IV, § 4 of the United States Constitution and the constitutional right to procedural due process in disciplinary actions as set forth in *Re Ruffalo*, 390 U.S. 544, 20 L.Ed.2d 117, 88 S. Ct. 1222 (1968). The pertinent text is set forth in the Appendix, pursuant to Supreme Court Rule 14.1 (f).

STATEMENT OF THE CASE

A. THE FACTS

Petitioner began serving as Custer County Attorney in August, 1980. He was elected to succeeding terms in 1982 and 1986, serving in that office during the state court action. Petitioner is a friend of Donna Winbolt, the owner of the Tumbleweed Cafe. At his friend, Donna Winbolt's instance, in 1985 and 1986, he anonymously left some

gifts of clothing for some of her underprivileged employees, one of whom was Daniel Speer.

In June, 1986, the County Attorney received a police report and information that Daniel Speer had driven some juveniles to the Drive-in Theatre where he broke in and vandalized it. He endangered the lives of the juveniles by having them hang down on ropes from the top of a second story building.

The police report stated that the victim did *not* want the defendant prosecuted, if he cooperated with the authorities. A routine settlement of the case was reached wherein the charges would be dismissed if the defendant stayed out of trouble for the summer. About a month later, Petitioner together with police captain Carl Speer, his wife Sherry Speer, and brother Daniel Speer, drove from Broken Bow, Nebraska to Omaha, Nebraska to attend a music concert.

Petitioner and Daniel Speer subsequently traveled from Broken Bow to Lincoln, Nebraska and to the World's Fair in Vancouver, Canada.

Petitioner paid for all expenses of these trips as he has for years, customarily paid for all expenses of groups of individuals traveling with Petitioner. Petitioner is more financially affluent than the police officers and others with whom he travels. On one occasion, when the County Attorney was planning a trip with some police officers, the County Attorney paid for expenses of the police officers, even though due to some last minute business, Petitioner was unable to go along on the trip.

After returning from the World's Fair, at the end of September, 1986, the County Attorney learned that Daniel Speer had possibly sexually assaulted a grade school girl.

Petitioner passed this information on to the sheriff's office. Daniel Speer then ceased speaking to Petitioner. Upon the advice of his attorney, Daniel Speer also ceased speaking to his brother, police captain Carl Speer.

In December, 1986, the County Attorney received information that Daniel Speer had assaulted and abducted a 16 year old boy. Abduction charges were filed against Speer. He was arrested and spent the night in jail. Speer then threatened to assault the Prosecutor. While pointing at County Attorney George Rhodes, Daniel Speer also said: "I'm really going to get even."

After his arrest, Speer began making death threats against the Prosecutor and Speer was twice caught committing felonies to obtain munitions in violation of 18 USCA § 922 (n) (Cumulative Supplement).

After his arrest, Speer also began making a scandalous allegation against the County Attorney. Speer had previously received psychiatric treatment. The County Attorney withdrew from the prosecution of Speer, so that Speer's cases would not be affected by Speer's antagonism of the Prosecutor.

Brad Roth was appointed Special Prosecutor. Roth admitted that the kidnapping charge was technically correct. However, Roth was uncertain as to whether he could obtain a conviction, since Roth was inexperienced as a prosecutor. Roth dismissed the kidnapping charge. Roth refused a defense offer to settle the case with a misdemeanor. Roth filed a felony charge of First Degree False Imprisonment against Speer. Months later, Roth settled the case with the same plea bargain which Petitioner had extended when Petitioner served as prosecutor in the case.

Roth also charged Speer with First Degree Sexual Assault upon a child. Roth then contacted Petitioner. Petitioner responded, informing Roth that the evidence was insufficient to obtain a conviction on the sexual assault charge which Roth had filed. Upon a jury trial, Speer was acquitted on this charge which Roth filed.

Roth began using his position to obtain work product information from his client, the State, which Roth converted for use against his client, the State, for the benefit of Mr. Roth's criminal defense clients.

The Petitioner objected to Roth's unethical conduct and requested appointment of different court-appointed defense counsel. The District Court on its own motion, instead, terminated Roth from the position of Special Prosecutor. Following his termination, Roth then began billing the County four and five times the usual amounts for court-appointed attorney's fees. The County Attorney objected to Mr. Roth's excessive fees. The County Board eventually curtailed Mr. Roth's excessive fees by hiring a public defender.

Roth and Speer then serving as complaining witnesses, attacked the County Attorney through the Respondent Bar Association. Using Roth and Speer's inflammatory and scandalous accusations, many of which Petitioner was not even given notice by charges, Respondent obtained a suspension of the Prosecutor's license to practice law.

B. THE RAISING OF THE FEDERAL QUESTIONS IN THE TRIAL COURT

This case was an original action in a state court of last resort. The federal questions were raised in the briefs

filed in the state court and Petitioner introduced as part of his evidence, Exhibit 63, a certified copy of a judgment and decree from a Georgia Court which had ruled that use of disciplinary proceedings operate in derogation of the franchise, when they are employed against an elected executive officer acting under color of law and within the scope of his official duties.

1. "PERSONAL INTEREST" DEFINED

Speer's scandalous allegation was that while at the fair, in 1986, Petitioner made a sexual advance by putting his arm around Speer. As stated in Petitioner's REPLY BRIEF which was filed with the trial court on November 27, 1989:

. . . The formal charges do NOT allege that "Respondent made a homosexual advance toward Daniel Speer". The formal charges do NOT allege DR 1-102 (3) which prohibits conduct involving moral turpitude.

The charges merely allege that *Daniel Speer had made an allegation against Respondent* of an advance and [that] Respondent denied the allegation, [with the charges] proceeding upon a claim of disqualification under DR 5-101 (A) which prohibits an attorney from handling a case in which he has a conflicting personal interest.

* * *

Being the subject of an allegation made by a defendant does NOT disqualify a prosecutor, *Wheeler v. District Court in and for County of Adams*, 504 P. 2d 1094 (S. Ct. Colo. 1973). Petitioner's REPLY BRIEF, filed with trial court on November 27, 1989.

In *Wheeler v. District Court in and for County of Adams*, 504 P. 2d 1094 (S. Ct. Colo. 1973), the defendant had

actually testified against the District Attorney before a grand jury which was investigating the District Attorney. The defendant then claimed that the District Attorney was disqualified from prosecuting him. The Supreme Court of Colorado, sitting en banc, ruled that the District Attorney was NOT disqualified.

The judgment and decree from *Michael J. Bowers, Attorney General of Georgia vs. The State Bar of Georgia*, which is Petitioner's Exhibit 63, which was received as evidence, states:

It is apparent to the Court that judges, Attorneys General, District Attorneys, and other public lawyers cannot be subject in all respects to the same rules and prohibitions as private practitioners, because of the special and higher duties of public office. Distinct Canons of Ethics already have been promulgated for the judiciary, and it follows that the professional obligations of public lawyers, actively practicing as public lawyers, actively practicing as public advocates, could withstand amplification and clarification. That duty, however, lies with the proper rulemaking authority, such as the Supreme Court or the legislature. Exhibit 63

Rather than seeking to legislatively change the definition of "personal interest" through the state Supreme Court's rule-making authority, the Respondent instead changed the law through ex post facto prosecution of the Petitioner. The Petitioner had complied with all existing law. At the time that Petitioner served as County Attorney and handled Speer's criminal cases, with respect to county attorneys, the definition of "personal interest" in a criminal case was limited to being the actual victim of the crime being prosecuted. In his Answer, Petitioner stated:

. . . With regard to county attorneys, personal interest is defined by law as being the actual

victim of the crime being prosecuted, *State vs. Boyce*, 194 Neb. 538, 233 N.W.2d 912 (1975) [facts for said case stated in *State vs. Saltzman*, 194 Neb. 525, 233 N.W.2d 914 (1975)]. Answer to Formal Charges, page 1

In his Brief filed in state court on October 16, 1989, Petitioner cited and argued the existing case law, which included a case wherein the criminal defendants kidnapped a police officer as part of a plot to murder a County Attorney.

The County Attorney filed kidnapping charges against Gary Saltzman and Billy Boyce. Boyce filed a motion for a special prosecutor. . . . This Court held that, with respect to county attorneys, having a "personal interest" means being the actual victim of the crime being prosecuted.

. . . Where he is the actual victim of the alleged crime, or his property is the subject of it, the cases generally find him to be disqualified. The basis for the rule is that where the county attorney is in effect an injured party, he has a personal interest in securing a conviction and therefore can no longer be disinterested and impartial. . . . *State vs. Boyce*, [233 N.W.2d 912] 194 Neb. 538 at 540 (1975).

* * *

Boyce contends that the County Attorney was injured party in this kidnapping offense because the defendants committed the offense with the *intention* of committing a subsequent and different crime against the person of the County Attorney, would have been justified in disqualifying himself, *he was not disqualified as a matter of law. . . . Id. . . .*

The grounds for mandatory disqualification of a County Attorney are statutory. They are found in Section 23-1206 R.R.S. Neb. 1943 (Reissue 1987) which provide that the County Attorney may not

serve as attorney for either the victim or defendant. Where the County Attorney is the actual victim of the crime being prosecuted, he is disqualified as having a "personal interest" in the case. . . . When he is not the actual victim then he does not have a "personal interest" in the case and disqualification is a matter of his discretion, which may be reviewed by the trial court, upon a motion which may be made by either the defendant or victim. Section 23-1205 R.R.S. Neb. 1943 (Reissue 1987); *State vs. Boyce, Id.* [233 N.W.2d 912]

BRIEF filed by Petitioner in state court on October 16, 1989, pages 33-34 and page 35.

* * *

Hindsight is always twenty-twenty. If . . . [Petitioner] had known on July 3, 1986, when he made a routine settlement of a case involving Dan Speer, that Speer suffered from mental illness and would seven months later begin making scurrilous false allegations, . . . [Petitioner] certainly wouldn't have acted on Speer's case or traveled with him later that summer. However, . . . [Petitioner] did not have the omniscient viewpoint with which the case presents itself to this Court. George was *not* employed by Speer, and not disqualified under the law. Section 23-1206 R.R.S. Neb. 1943 (Reissue 1988), *State vs. Boyce, supra* [233 N.W.2d 912], *State vs. Melerine, supra* [109 So. 2d 454], *State vs. Newman, supra* [605 S.W.2d 781], *State vs. Saltzman, supra*, *State vs. Williams, supra* [643 S.W.2d 641], *Hall vs. State, supra* [210 So. 2d 852], *Wheeler vs. District Court in and for County of Adams, supra* [504 P. 2d 1094] . . .

BRIEF filed by Petitioner in state court on October 16, 1989, page 37.

The state court ruled against the Petitioner, based upon dicta in a case which was decided *after* Petitioner had withdrawn on his own motion from handling the Daniel Speer cases.

Rhodes argues that a prosecutor is disqualified only when he is the victim in a case which he prosecutes. . . .

In *Kennedy v. L.D.*, 430 N.W. 2d 833, 837 (Minn. 1988), the Supreme Court of Minnesota stated, "It is improper for prosecutors to participate in cases which involve personal friends or relatives. . . ." *State ex rel NSBA vs. Rhodes*, 453 N.W.2d at 53.

Petitioner had withdrawn on his own motion on January 26, 1987 and the *Kennedy v. L.D.* opinion was issued over a year later. In that decision, the Minnesota Supreme Court held that there was no conflict of interest in having disciplinary complaints filed against disciplinary board members handled within the normal channels of the disciplinary system.

The state court also cited *People v. Doyle*, 159 Mich. App. 632, 406 N. W. 2d 893 (1987) which was another case which was decided *after* the Petitioner had withdrawn on his own motion from handling the Speer cases. In *People v. Doyle, Id.*, the prosecutor refused to withdraw and the trial court sustained the defense motion for a special prosecutor. It was not a disciplinary matter, but rather an appeal by the prosecutor from the decision to appoint a special prosecutor.

The only other decision cited by the state court regarding disqualification of a prosecutor was *State vs. Bell*, 370 P.2d 508 (1962), in which the prosecutor, like the Petitioner in the instant case, recused himself from the case. In *State vs. Bell, Id.*, based upon the request of the prosecutor, the trial court appointed a special prosecutor over the objections of the criminal defendant. In the instant case, the Petitioner, County Attorney George Rhodes, disqualified himself on his own motion and it

was the Defendant Speer, who objected to the appointment of a special prosecutor.

2. THE DENIAL OF CONSTITUTIONAL DUE PROCESS IN FAILING TO NOTIFY PETITIONER BY CHARGES PRIOR TO THE TRIAL OF ACCUSATIONS UPON WHICH PETITIONER WAS BEING PLACED UPON TRIAL

In this case, the evidentiary hearing was held before a referee on July 12 and 13, 1989. At the trial, Speer and Roth, engaged in making numerous scandalous and inflammatory accusations, which were *not* contained in the formal charges and one of the accusations was so outrageous that it even contradicted the formal charges.

The criminal mischief case had been dismissed prior to the trip to the world's fair and the dismissal was delivered to Speer in Broken Bow, Nebraska on September 24, 1987. The formal charges in the case state:

On or about September 24, 1986, the Respondent gave Daniel Speer a letter or document indicating that the Respondent had dismissed the Criminal Mischief charge which had been filed in the County Court of Custer County. *Id.* at p. 3

The documentary evidence and the Petitioner's testimony are in conformity with above-statement contained in the Formal Charges.

The record contains Rhodes' letter of September 24, 1986, informing Speer that the criminal mischief charge had been dismissed. The letter is on Rhodes' business letterhead and states only that "I have enclosed herewith, your formal notice that I have dismissed the above-referenced case." A 'nolle prosequi' dated September 24, 1986, was enclosed with the letter.

Rhodes testified that he gave the letter and nolle prosequi to Speer on September 24 when he picked Speer up at Speer's house to go to Vancouver. *State ex rel NSBA vs. Rhodes*, 453 N.W.2d at 80.

At the trial Speer gave an inflammatory scandalous version which even contradicted the formal charges, as Speer claimed that the dismissal was delivered several days later as a present in Vancouver with an invitation to go to the Bahamas.

On September 24, Rhodes and Speer flew from Omaha to Seattle, spent the night in Seattle, and drove a rental car to Vancouver. They rented a hotel room, spent two nights in Vancouver, and attended the world's fair. . . .

* * *

Speer testified that Rhodes delivered the documents to him in Vancouver, saying, "I was saving this for a special occasion, but you might as well have this now." Speer stated that Rhodes then invited him on a trip to the Bahamas. *State ex rel NSBA vs. Rhodes*, 453 N.W.2d at 79-80.

The formal charges did not give any notice of Speer's accusation of an alleged invitation to the Bahamas and did not contain any mention of other inflammatory and prejudicial accusations which Speer made at the trial. In his brief filed with the trial court on October 16, 1989, Petitioner objected to the use of these uncharged allegations which objection and a listing of said uncharged allegations appears in the record as follows:

ASSIGNMENT OF ERRORS

* * *

2. The Referee erred in considering and including in his Report, allegations not contained in the formal charges, as Respondent [Petitioner in this Court] did not receive adequate notice nor adequate opportunity to prepare to defend on these matters. *Id.* at page 1.

At the Referee's hearing, Speer became a veritable avalanche of newly fabricated allegations which were not in his original statement . . . *and not in the formal charges*: Some of these, which are included in the Report of Referee are: that Respondent invited him to go to the World's fair during a discussion of the criminal mischief case, *Id.*, at 13; that the Respondent was going to appoint Speer deputy county coroner, *Id.* at 15; that Respondent told him about the anonymous gifts while discussing the criminal mischief case, *Id.* at 11; that the trips that he had taken should be kept secret, *Id.* at 13; and that he had reservations to go to the Bahamas with the Respondent, . . . *Id.* at page 21 (Emphasis supplied)

It takes time to locate documentary evidence, witnesses, and to adequately prepare to examine witnesses, in order to insure that the necessary testimony is introduced. Daniel Speer poisoned the proceedings with numerous newly fabricated inflammatory allegations which were not contained in the charges. One simply does not receive a fair hearing by being overwhelmed by a flood of surprise allegations from a complaining witness, who is a criminal, that falsifies testimony. As a matter of due process, a respondent in a disciplinary action is entitled to be notified by the charges of what specific facts the state intends to rely in making its claim that discipline should be imposed. . . .

Certainly the defendant in this case, whose means of livelihood are affected by its results should have a right to know upon what particular facts the state was going to rely in claiming that he should be disciplined or disbarred. . . . The defendant had a right to rely upon the fact that the only matters to be considered were those particularly charged in the complaint Since the conduct of the defendant, upon which the referee recommends that he be disciplined, is not particularly set forth in the complaint, it was not properly before the referee and is not properly before this court. . . . In a disbarment proceedings only those matters which are specifically charged in the complaint can be considered. The complaint is therefore dismissed. *State ex rel Nebraska State Bar Association vs. Price*, 144 Neb. 546 (1944).

BRIEF filed by Petitioner in the trial court on October 16, 1989, p. 24.

Petitioner was denied his constitutional right of due process. The state court incorporated into its opinion, the uncharged allegations to which petitioner had objected in his brief which was previously quoted herein. A copy of the state court opinion which considered and included said uncharged allegations is included in the Appendix.

At the trial, Roth also made numerous inflammatory and prejudicial allegations which were *not* contained in the charges. Petitioner's counsel objected:

MR. CONNOLLY: I'm going to object to this on relevancy. I think there's two allegations that are in the formal complaint that pertain to Mr. Roth. (33:20-23)

The referee included Roth's *uncharged* allegations in his Report. Petitioner objected and took exception in his BRIEF filed with the state court on October 16, 1989:

2. MR. ROTH'S UNCHARGED ALLEGATIONS

Like Dan Speer, Mr. Roth took advantage of the Referee's hearing to retaliate against the person who brought his misconduct to the attention of the Court and poisoned the proceedings with malicious false allegations against the Respondent which were not contained in the formal charges. *Id.* at 45

* * *

In this case, Relator graciously stipulated that allegations numbers 36 and 39 of the formal charges would not be pursued. This stipulation appears in paragraph #1 of the Prehearing Conference Order. Thus, the only matters pertaining to Brad Roth of which the Respondent had proper notice as being issued at the Referee's hearing, were the matter of the September 16, 1987 deposition and the attempt to exchange discovery material on September 18, 1987. Pages 48-49, Petitioner's BRIEF filed Oct. 16, 1989.

The Petitioner was denied his due process right to be notified of the charges against him and he was convicted of Roth's allegations which were not even contained in the charges. The state court's judgment includes the following which was NOT alleged in the charges:

Rhodes' Behavior Toward Special Prosecutor

In April or May 1987 Roth told Rhodes that he was considering reducing the false imprisonment charge against Speer to two class I misdemeanors. Roth testified that Rhodes was not pleased and did not think it was a proper plea bargain. . . .

* * *

Roth testified that after the plea agreement, his professional relationship with Rhodes

became strained. Rhodes barely spoke to Roth after Speer's plea was accepted. For example, Rhodes began sending everyday correspondence to Roth by certified mail, made many objections to Roth's motions and discovery requests, and would not give Roth access to police reports, and indicated there would be no more plea bargaining on felony cases. . . . *State ex rel. NSBA v. Rhodes*, 453 N.W.2d at 83-84.

These highly prejudicial allegations were *NOT* contained in the formal charges upon which the case was tried. A copy of the formal charges is included in the Appendix. Petitioner also "raised the federal question" in his REPLY BRIEF, filed on November 27, 1989:

In Re Ruffalo, supra, the United States Supreme Court examined the issue of the constitutional right to procedural due process of law in disciplinary actions and held that it includes notice of the allegations, prior to the hearing.

If there are any constitutional defects in what the Ohio court did concerning Charge 13, those defects are reflected in what the Court of Appeals decided.

. . .

We turn then to the question of whether in Ohio's procedure there was any lack of due process.

Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex parte Garland*, 4 Wall 333, 380 18 L ed 366, 369; *Spevack v. Klein*, 385 US 511, 515, 17 L ed 2d 574, 577, 87 S. Ct. 625. *He is accordingly entitled to procedural due process, which includes fair notice of the charge.*

. . . *The charge must be known before the proceedings commence. . . . Id.* (Emphasis supplied.)

Page 7, REPLY BRIEF filed by Petitioner in State Court on Nov. 27, 1989.

The trial court considered and included in its opinion, the allegations which were NOT in the charges.

In his *Brief in Support of Motion for Rehearing* filed in state court, Petitioner renewed his objections to this denial of due process:

ASSIGNMENTS OF ERROR

- II. The only allegations regarding Daniel Speer properly before the Court are those stated in the formal charges. Daniel Speer's specific allegations of a manipulation of the system regarding his criminal mischief case are not contained in the formal charges. The Court erred in considering those allegations and in finding that DR 7-102 had been violated.

* * *

- IV. The Court erred in considering accusations not contained in the charges regarding Brad Roth. . . .
Id. page 1

PROPOSITIONS OF LAW

* * *

- II. THE CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS OF LAW REQUIRES THAT IN A DISCIPLINARY ACTION, ALL ACCUSATIONS FOR WHICH THE RESPONDENT IS PLACED ON TRIAL, MUST BE SPECIFIED IN THE CHARGES PRIOR TO THE TRIAL SO THAT RESPONDENT MAY HAVE AN OPPORTUNITY TO GATHER EVIDENCE AND PREPARE TO CALL WITNESSES IN HIS DEFENSE. ACCUSATIONS NOT PRECISELY SET FORTH IN THE CHARGES ARE NOT PROPERLY BEFORE THE COURT.

Re Ruffalo, 390 U.S. 544, 20 L. Ed. 2d 117, 88 S. Ct. 1222 (1968).

State ex rel. NSBA vs. Price, 144 Neb. 542 (1944).

Petitioner's BRIEF IN SUPPORT OF MOTION FOR REHEARING, p. 2

. . . As stated in Respondent's Affidavit in Support of Motion for Rehearing, he relied upon the law which provides that disciplinary trials are limited to the specific allegations contained in the charges.

If the County Attorney had been given notice in the charges that he was actually being placed on trial upon the allegations listed herein on page 4, he would have introduced additional evidence to show that the criminal mischief charge was filed against Daniel Speer, as a direct result of Speer's criminal conduct which generated a police report and a routine settlement of the case was reached. *Id.* at p. 6

* * *

The Formal Charges do *not* allege Respondent objected to the Speer plea bargain and demanded a felony conviction. The Formal Charges do *not* allege that Respondent then sent correspondence to Roth by certified mail; made objections to Roth's motions and discovery requests would not give Roth access to police reports and indicated that there would be no more plea bargains on felony cases.

The failure to notify Respondent by charges that he was being placed on trial regarding extremely serious accusations deprived Respondent of a fair hearing and denied him his right of procedural due process of law. *Re Ruffalo, supra.*

BRIEF IN SUPPORT OF MOTION FOR REHEARING
Page 10.

Petitioner's motion for rehearing was overruled.

3. PETITIONER'S DISCRETIONARY ACTIONS COMPLIED WITH ALL STATUTES AND EXIS- TING CASE LAW INTERPRETATIONS OF THE CODE OF PROFESSIONAL RESPONSIBILITY.

The Nebraska Statutes provide that the County Attorney is ex officio coroner. In Nebraska, coroners are regular peace officers with the same powers and prerogatives as other peace officers, including a statutory duty to arrest law violators on sight. In *State ex rel. Crosby v. Moorhead*, 159 N.W. 412 (1916), the Nebraska Supreme Court upheld the legislation which vested county attorneys with the additional office of county coroner. The portion of the record wherein this matter was presented to the trial court, including verbatim quotations of the relevant statutes, is included in the Appendix.

On one occasion, while wearing his law enforcement uniform, Petitioner attended a deposition. The state court decision states:

At this time, Rhodes usually carried a firearm because of Speer's threats. Rhodes stated that the rule of the district court was that only uniformed officers could wear sidearms in the courtroom. He decided on the spur of the moment to wear the uniform to the deposition so he would comply with the court rule regarding sidearms.

* * *

. . . Rush's attorney, Gary Washburn, testified at the referee's hearing that Rhodes' manner was very calm during the Speer deposition and that the only loud or boisterous language came from Speer. *State ex rel NSBA vs. Rhodes*, 453 N.W.2d at 85-86.

The formal charges do NOT allege a "manipulation of the system" against Daniel Speer. The factual allegations which are actually contained in the formal charges, allege

that the Petitioner filed and dismissed some cases involving Daniel Speer and was acquainted with Daniel Speer.

In his Answer, Petitioner stated:

. . . the County Attorney did not have any personal interest with regard to court cases wherein Daniel T. Speer was a defendant, as the County Attorney was not the victim of the crimes alleged in said court cases. With regard to county attorneys, personal interest is defined by law as being the actual victim of the crime being prosecuted, *State vs. Boyce*, 194 Neb. 538, 233 N.W. 2d 912 (1975) [facts for said case stated in *State vs. Saltzman*, 194 Neb. 525, 233 N.W. 2d 914 (1975)].

Answer to Formal Charges, page 1.

The law regarding personal interest has been previously set forth herein in the section entitled " 'Personal Interest' Defined" and reflects that Petitioner did not have a "personal interest" in the Daniel Speer cases under the case law existing at the time Petitioner acted upon said cases. The existing case law defined "personal interest" as being the actual victim of the crime prosecuted. Petitioner withdrew on his own motion, "prior to the preliminary hearing" and it was Daniel Speer who objected to the appointment of a special prosecutor.

The formal charges alleged that the Petitioner had discussed with Daniel Speer, Speer's alleged sexual relations with a child, Bobbie Jo Amos. In his answer, the Petitioner stated:

. . . The County Attorney is authorized by law to interview suspects in criminal matters, *State vs. Reeves*, 216 Neb. 206 344 N.W. 2d 433 (1984).

Petitioner's ANSWER TO FORMAL CHARGES,
page 2.

In *State vs. Reeves*, 344 N.W. 2d 433 (1984), the County Attorney, Ron Lahners, went to the hospital and interviewed a suspect in a murder case. Mr. Lahners then prosecuted the suspect for murder. The defendant moved to disqualify the county attorney, Mr. Lahners, who was called as a witness by the defendant. The defense motion was overruled. The Nebraska Supreme Court held:

"Our justice system has encouraged trial lawyers to participate directly in case preparation, including interviewing witnesses. . . . "

* * *

. . . He [the county attorney] would then follow up on any details of the crime, which in this case involved a trip to the hospital to check on the victim and an interview with the defendant after his arrest. It is ludicrous to suggest that a defendant can disqualify a prosecutor every time he becomes personally familiar with the facts of the case. *State vs. Reeves, Id.*

The *Reeves* case was the current existing case law, when the Petitioner County Attorney interviewed a suspect, regarding the suspect's alleged participation in a sexual assault. The state court ruled that it was improper for the Petitioner to interview the suspect.

4. THE VIOLATION OF ARTICLE IV, § 4 OF THE UNITED STATES CONSTITUTION.

As part of his trial evidence, Petitioner introduced Exhibit 63, the judgment and decree from *Michael Bowers Attorney General v. The State Bar of Georgia*, which held that amplification of disciplinary law should be done legislatively rather than through ex post facto prosecution of an elected official and that such ex post facto

prosecution was an impermissible intrusion by the judiciary on the authority of the executive. A copy of Exhibit 63 is included in the Appendix.

Petitioner's license was suspended for discretionary actions performed in office which were permitted by the law existing at the time said duties were performed. Petitioner excepted to this suspension, arguing to the trial court:

PROPOSITIONS OF LAW

* * *

IV. EACH STATE MUST MAINTAIN A REPUBLICAN FORM OF GOVERNMENT WITH AN INDEPENDENT EXECUTIVE BRANCH OF GOVERNMENT CHOSEN BY THE VOTERS.

Constitution of the United States of America, Article IV, Section 4.

BRIEF IN SUPPORT OF MOTION FOR REHEARING,
page 2.

Petitioner's motion for rehearing was overruled.

ARGUMENT

In his Answer to Formal Charges, Petitioner stated:

20. In April, 1987, special acting county attorney Brad Roth accepted employment as defense counsel for criminal defendants Pete Coleman and Cecil Hunsaker. Mr. Roth then began taking information which he was obtaining in his capacity as attorney for the State and used the information against his client, The State, for the benefit of his clients Pete Coleman and Cecil Hunsaker. When these actions of Mr. Roth came to the attention of the District Court,

the Court, on June 11, 1987, on its own motion, terminated Brad Roth from the position of special acting county attorney.

21. Following his termination, Mr. Roth began submitting billings to Custer County for fees far in excess of the Court's guidelines for court-appointed counsel. For the period of July 1, 1987 to January 31, 1989, the total billings to the County by Mr. Roth's firm were more than double those of the other law firms. For the fiscal year July 1, 1987 to June 30, 1988, the amount expended by the District Court for court appointed attorneys fees was 309% of the amount contained in the court's budget. As a result, the Custer County Board of Supervisors contracted to hire public defender who took office January 1, 1989. *Id.* p. 5-6

The allegations that Brad Roth was terminated as special prosecutor due to Roth's conflict of interest were *NOT* contested at the trial and Roth's unethical conduct regarding this matter was shown by both testimony and court records received as evidence. Yet, it was the County Attorney, George Rhodes, who was charged and subjected to a suspension of his license to practice law, after he objected to Mr. Roth's excessive fees.

. . . Rhodes believed that Roth was charging the county excessive fees and was using work product which he was gaining as attorney for the State and using it against the State. *State ex rel NSBA vs. Rhodes*, 453 N.W.2d at 84.

After the Petitioner objected to the amounts of some attorney's fees, the Respondent bar association placed Petitioner, Custer County Attorney George Rhodes, on trial, without notice by charges of the actual major allegations against him and a criminal's falsified testimony was used as evidence to suspend the County Attorney's license to practice law.

Credibility of Daniel Speer

The referee concluded that "[t]here is no question but that Daniel Speer, the principal witness . . . falsified parts of his testimony and that he was impeached numerous times on cross examination by Mr. Rhodes' counsel and by the witnesses called for the purposes of impeachment." *State ex rel NSBA vs. Rhodes*, 453 N.W.2d at 87.

The Petitioner had complied with all existing statutes and the existing interpretations of the professional code. The law was then retroactively changed so that Petitioner's license to practice law was suspended based upon discretionary actions taken in the performance of his duties as County Attorney, which were lawful at the time they were performed.

The Petitioner, George Rhodes, as County Attorney, had a duty to represent his client, Custer County, regarding Roth's billings for attorney's fees. With regard to billings to the County for court-appointed attorneys fees, the rule of law is:

. . . Although the county may not be a party to the proceeding in the usual sense, the county is represented by the county attorney, who can make whatever showing is necessary to ensure that the district court has the evidence necessary to make a proper finding.

In Re Claim of Rehm and Faesser, 410 N.W. 2d 92, 226 Neb. 107 (1987).

The record in the instant case, shows the billings which drew objections, were four and five times the amount of the trial court's guidelines. While objecting to payment of attorney's fees may not be popular among certain members of the Respondent bar association, nevertheless, Petitioner was acting within the scope of his legal duties in objecting to Roth's fees.

The Respondent bar association filed its suit against the Petitioner, Custer County Attorney George Rhodes after he objected to payment of attorney's fees and the suspension was obtained for the purpose of preventing Petitioner from serving as County Attorney. In arguing for the imposition of disciplinary sanctions Respondent bar association stated in its brief:

The Respondent in this case continues to serve as the County Attorney of Custer County, Nebraska. . . . *Brief of Relator*, p. 24.

In connection with his attempt to appeal to this Court, Petitioner sought a stay from the trial court. The Respondent opposed the stay, on the grounds that the stay would permit the Petitioner to continue serving as Custer County Attorney.

Respondent obtained the suspension of Petitioner's license in 1990, based upon allegations three to five years old. The Petitioner, County Attorney George Rhodes, had complied with all existing law. Simply as a matter of his own discretion, on his own motion, Petitioner withdrew from the Daniel Speer cases, prior to the preliminary hearing. This withdrawal was at an earlier stage of the proceedings than is used by the office of Respondent's Counsel for Discipline, when that office has a mandatory duty to disqualify itself from a case.

There is a mandatory disqualification when the prosecutor is the complaining witness in the case *State vs. Jones*, 268 S.W. 83 (Supreme Court of Missouri 1924), or when an attorney would be a material witness, *State ex rel NSBA vs. Neumeister*, 234 Neb. 47, 449 N.W. 2d 17 (1989).

In *State ex rel NSBA vs. Kirshen*, 232 Neb. 445, 441 N.W. 2d 161 (1989) the Nebraska Supreme Court noted that a Committee on Inquiry hearing in a disciplinary

action is a probable cause or preliminary inquiry hearing. The charges against the respondent in that case included allegations that he failed to respond to notices from the Counsel for Discipline's office. The charges were filed by the Counsel for Discipline's office which then appeared at the hearing as prosecutor *and* complaining witness. The Counsel for Discipline's office withdrew from the case *subsequent* to the preliminary hearing stage of the case, while the Petitioner's withdrawal from the Speer cases was *prior* to the preliminary hearing.

With regard to the fitness of the Petitioner to practice law, the record in the case contains the following, which is a part of the judgment of the state court of last resort:

Character references

Roth [when cross examined] testified that, as of the time of the referee's hearing, he and Rhodes had gotten along professionally for approximately 1 year. Roth described Rhodes as being courteous and professional . . .

Howard Spencer, Gary Washburn, and Steven Stumpff all practicing attorneys in Broken Bow, testified they were of the opinion that Rhodes was truthful and honest. None of these witnesses had experienced an instance where Rhodes filed criminal charges which were not based on the facts or the law. Rhodes was described as a good criminal lawyer who was well prepared and showed a good grasp of the issues.

Ronald Ruff, an attorney from North Platte whose firm contracts to public defender work in Custer County . . . was of the opinion that Rhodes was well prepared and had a good grasp of the law. Ruff noted that Rhodes was extremely courteous and that he had not noticed

any charges filed by Rhodes that were not based on the facts or the law.

Attorneys Carlos Schaper, William Steffens and Ted Huston also testified that they were of the opinion that Rhodes was truthful, honest, courteous, professional and competent.

The record also contains letters of endorsement from the following people: Robert Scott, Custer County Supervisor; Herbert Buntmeyer, Custer County supervisor; Robert L. Leatherly, Custer County Supervisor; Ronald Ruff; W.G. Arnold, D.D.S.; Grayston Cool, Custer County Supervisor; Roberta Snyder, teacher; Donald Ellingson, register of deeds; Lea Dell Jones, Custer County Treasurer; Eugene Schiltz, Custer County surveyor; Robert Jacobsen, mayor of Broken Bow; Edwin Scott, Custer County supervisor; L. O. Mulbach chief of police; Larry Hickbottom, Custer County supervisor; Bryan Clark, pastor of Berean Fundamental Church; John Finney, former associate county judge and clerk magistrate; Marian Woodward, Custer county clerk; Leroy Schaad, Custer County assessor; Harry Duryea, Custer County highway superintendent; Max Bristol, Custer County weed control authority superintendent; and Joseph Divis, Blaine County Attorney.

State ex rel NSBA vs. Rhodes, 453 N.W.2d at 90.

The statements from the foregoing officials were received in evidence as Exhibits 45 and 62. These exhibits are included in the Appendix and reflect that the Petitioner is one of the best county attorneys which the County has ever had.

The Respondent is wrongfully using its disciplinary powers for political purposes in determining who will hold an elective public office, rather than to police unethical conduct. Due to Mr. Roth's unethical conduct, the District Court which had appointed him special prosecutor, terminated Mr. Roth's appointment. Yet, it was the

elected County Attorney, Petitioner George Rhodes, who was subjected to disciplinary action and a suspension of his license, after he objected to payment of attorney's fees, although he had complied with all existing law.

Respondent's prevention of Petitioner from serving as the elected County Attorney, by suspending Petitioner's license, undermines the franchise as much as a direct limit upon the franchise itself.

In *Powell v. McCormack*, 395 U.S. 486, 23 L. Ed. 2d 491 (1969), the United States Supreme Court stated:

. . . A fundamental principle of our representative democracy is, in Hamilton's words, "that the people should choose whom they please to govern them." 2 Elliot's Debates 257. As Madison pointed out at the convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself. . . . *Powell v. McCormack*, 395 US 486 at 547, 23 L. Ed. 2d 491 at 531 (1969).

In Petitioner's Exhibit 63, the final judgment and decree in *Michael J. Bowers, Attorney General, vs. The State Bar of Georgia*, which received as evidence by the trial court in this case, it is said:

It is this Court's opinion that to accord the State Bar removal power over elected officials, concurrent with the executive, is an impermissible intrusion by the judiciary on the authority executive. To permit the Bar to suspend or disbar the Attorney General prior to any regulatory action by the proper executive authority would be in derogation of the franchise. . . . The fear of disciplinary proceedings stemming from any act done under the color of public duty is too great an inhibition on the vigorous fulfillment of that duty. . . .

* * *

It is apparent to the Court that judges, Attorneys General, District Attorneys, and other public lawyers cannot be subject in all respects to the same rules and prohibitions as private practitioners, because of the special and higher duties of public office. Distinct Canons of Ethics already have been promulgated for the judiciary, and it follows that the professional obligations of public lawyers, actively practicing as public advocates, could withstand amplification and clarification. That duty, however lies with the proper rulemaking authority, such as the Supreme Court or legislature.

Petitioner's trial Exhibit 63.

If members of the bar may be placed upon trial without being given notice by charges prior to the trial, of the allegations being made against them and convicted for taking discretionary actions within the scope of their official duties which were lawful and complied with the case law interpretations of the Professional Code existing at the time such actions were taken, then such elected executives ultimately serve in office at the pleasure of their bar association, rather than the voters. In such situations, the bar association has absolute control over the executive branch and may suspend and disbar at will, an elected executive official whose policies are not in accord with the wishes of the bar association.

Such a control by the disciplinary branch of bar associations over elected officials violates Article IV, Section 4, of the United States Constitution. The use of disciplinary actions for purposes of determining who shall hold elective public office operates in derogation of the franchise and is a far more invidious political action than the collection of mandatory bar dues for political purposes which this Court recently prohibited in *Keller v. State Bar*

of California, No. 88-1905 - US -, - L Ed. 2d -, 58 LW 4661 (1990).

There is a split in decisions of state courts of last resort which range from Pennsylvania which has held that suspension of a law license may not be used to prevent an elected district attorney from performing his duties of office, *Synder's Case*, 152 A. 33 (1930), to Nebraska where County Attorneys and other elected members of the executive branch are subject to ex post facto prosecution without even giving them notice by charges, of the allegations being made against them.

WHEREFORE, Petitioner respectfully requests that the Court grant a writ of certiorari in this case and set forth the Constitutional guarantee that each state maintain a republican form of government. Petitioner respectfully requests that the Court reverse the decision of the lower court and that this Court hold that:

A. An elected public official who is placed upon trial in a disciplinary action has the constitutional procedural due process right to be notified by charges, prior to trial, of the allegations upon which he is going to be placed upon trial.

B. Discretionary actions of an elected public official which are within the scope of the official's duties and which comply with all existing statutes and interpretations of the professional code at the time such actions are taken, may not be used as grounds for suspending the official's license to practice law.

Respectfully submitted,

GEORGE G. RHODES - Pro Se
Petitioner
2nd & Garfield Street
Westerville, Nebraska 68881
Telephone: 308 935-1459



Case Number ____

In The
Supreme Court of the United States
October, 1990 Term

GEORGE G. RHODES,

Petitioner,

vs.

State of Nebraska ex rel
NEBRASKA STATE BAR ASSOCIATION,

Respondent.

**Petition For Writ Of Certiorari To The
Supreme Court Of The State Of Nebraska**

APPENDIX

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App. 1

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

State of Nebraska ex rel. Nebraska
State Bar Association, Relator,
v.
George G. Rhodes, Respondent.

Case Caption

State ex rel. NSBA v. Rhodes
Filed March 23, 1990. No. 89-142.

Original action. Judgment of suspension.

Dennis G. Carlson, Counsel for Discipline, for relator.

William M. Connolly, of Conway, Connolly and Pauley, P.C., for respondent.

STATE EX REL. NSBA V. RHODES

NO. 89-142 – filed March 23, 1990.

1. Disciplinary Proceedings: Due Process. Although a lawyer is entitled to due process of law in a disciplinary proceeding, technicalities cannot be invoked to defeat charges where there is evidence showing that the conduct alleged against the attorney is ethically wrong.
2. Disciplinary Proceedings. The Supreme Court may institute disciplinary proceedings on its own and has the inherent authority to direct the filing of disciplinary charges notwithstanding the action or inaction of the Committee on Inquiry.
3. Disciplinary Proceedings: Jurisdiction. Even if formal charges are filed with the Disciplinary Review Board after the time provided in Neb. Ct. R. of Discipline 9(H)(3)(h)

(rev. 1989), the delay is not jurisdictional and the rule does not require dismissal of the formal charges.

4. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.

5. **Disciplinary Proceedings: Proof: Appeal and Error.** In its de novo review of the record in a disciplinary proceeding against an attorney, and to sustain a particular complaint against an attorney, the Supreme Court must find that the complaint has been established by clear and convincing evidence.

6. **Disciplinary Proceedings.** In a disciplinary proceeding against an attorney, the basic issues are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.

7. **Prosecuting Attorneys: Conflict of Interest.** It is improper for prosecutors to participate in cases which involve personal friends or relatives.

8. **Prosecuting Attorneys: Conflict of Interest: Affidavits.** An affidavit alleging that the defendant and prosecuting attorney and their families had been close personal friends, that the defendant and prosecuting attorney had had business and political relations in the past, and that it would be difficult for the prosecuting attorney to conduct

a trial is a sufficient showing to warrant appointment of a special prosecuting attorney.

9. Prosecuting Attorneys: Conflict of Interest. Courts and the country recognize two policy considerations underlying the disqualification of prosecuting attorneys for a conflict of interest. The first policy served by the rule is fairness to the accused. The second policy served is the preservation of public confidence in the impartiality and integrity of the criminal justice system.

10. ____: _____. United States courts have consistently held that the appearance of impropriety is sufficient to justify disqualification of a prosecuting attorney.

11. Public Officers and Employees: Attorneys at Law. The conduct of a government attorney is required to be more circumspect than that of a private lawyer because improper conduct on the part of such an attorney reflects upon the entire system of justice in terms of public trust.

12. Disciplinary Proceedings. The nature and extent of discipline to be imposed is determined by a consideration of the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his or her present or future fitness to continue in the practice of law.

13. _____. The purpose of a disciplinary proceeding is not so much to punish an attorney as it is to determine, in the public interest, whether the attorney should be permitted to continue to practice law.

Hastings, C.J., Boslaugh, Caporale, Shanahan, Grant, and Fahrnbruch, JJ.

PER CURIAM.

This is a disciplinary proceeding against the respondent, George G. Rhodes, who was admitted to the practice of law in Nebraska on April 8, 1977.

Formal charges against the respondent were filed in this court on February 24, 1989. The respondent's answer was filed on March 13, 1989. The allegations in the formal charges center around the propriety of the respondent's conduct in prosecuting Daniel T. Speer and the respondent's behavior toward Bradley Roth, an attorney who was appointed special prosecutor for some of the Speer prosecutions.

The respondent was charged with having violated his oath of office as an attorney at law, as provided by Neb. Rev. Stat. § 7-104 (Reissue 1987), and the following provisions of the Code of Professional Responsibility:

DR 1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

.....

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

.....

DR 2-110 Withdrawal from Employment.

.....

(B) Mandatory withdrawal.

App. 5

A lawyer representing a client . . . shall withdraw from employment . . . if:

. . . .

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

(3). His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.

. . . .

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

. . . .

DR 5-105 Refusing to Accept or Continue Employment if the Interest of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of his client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105 (C).

. . . .

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

In his answer, the respondent generally denied the substantive allegations contained in the formal charges. The respondent further alleged that this court does not have jurisdiction over this matter because the hearing panel of the Committee on Inquiry did not transmit formal charges to the Disciplinary Review Board within 45 days, as required by Neb. Ct. R. of Discipline 9(H)(3)(h) (rev. 1989). In this case, the respondent alleges the formal charges were transmitted 53 days after the committee hearing.

We held in *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989), that a lawyer is entitled to due process of law in a disciplinary proceeding. However, technicalities cannot be invoked to defeat charges where there is evidence showing that the conduct alleged against the attorney is ethically wrong. *State ex rel. Nebraska State Bar Assn. v. Jensen*, 171 Neb. 1, 105 N.W.2d 459 (1960), *cert. denied* 365 U.S. 870, 81 S. Ct. 905, 5 L. Ed. 2d 860 (1961); *State ex rel. Nebraska State Bar Assn. v. Leonard*, 212 Neb. 379, 322 N.W.2d 794 (1982).

Pursuant to Neb. Ct. R. of Discipline 10(B) (rev. 1989), this court may institute disciplinary proceedings on its own and has the inherent authority to direct the filing of disciplinary charges notwithstanding the action or inaction of the Committee on Inquiry. Even if formal charges

are filed with the Disciplinary Review Board after the time provided in rule 9(H)(3)(h), the delay is not jurisdictional, and the rule does not require dismissal of the formal charges. We further note that the respondent has made no showing that he was prejudiced in any way by the alleged delay in the filing of the formal charges. The respondent's contention is without merit.

A referee was appointed on March 24, 1989, and the matter was heard on July 12 and 13, 1989. The report of the referee was filed in this court on August 15, 1989. The referee found that the respondent had violated the provisions of DR 1-102, DR 2-110, DR 5-101, and DR 7-102 and recommended that the respondent be suspended from the practice of law for a period of 5 years. Exceptions to the referee's report were filed by the respondent on August 25, 1989.

STANDARD OF REVIEW

A proceeding to discipline an attorney is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987), *cert. denied* ___ U.S. ___, 109 S. Ct. 31, 102 L. Ed. 2d 10 (1988); *State ex rel. NSBA v. Kirshen, supra*, See, also, *State ex rel. NSBA v. Cohen*, 231 Neb. 405, 436 N.W.2d 202 (1989); *State ex rel. NSBA v. Neumeister, ante* p. 47, 449 N.W.2d 17 (1989). In its

de novo review of the record in a disciplinary proceeding against an attorney, and to sustain a particular complaint against an attorney, the Supreme Court must find that the complaint has been established by clear and convincing evidence. *State ex rel. NSBA v. Douglas, supra*; *State ex rel. NSBA v. Kirshen, supra*. In a disciplinary proceeding against an attorney, the basic issues are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. NSBA v. Douglas, supra*; *State ex rel. NSBA v. Kirshen, supra*.

FACTS

The record shows that the respondent is the present Custer County Attorney. He was appointed to that office on August 5, 1980, and was elected in 1982 and 1986 to 4-year terms.

In the fall of 1985, Rhodes became personally acquainted with Daniel Speer. Speer was a 22-year-old Army veteran who was employed as a cook at the Tumbleweed Cafe in Broken Bow, Nebraska, where Rhodes ate meals nearly every day. Rhodes testified that he began leaving gifts for Dean Miller, another cafe employee, after the owner of the cafe, Donna Winbolt, told Rhodes that Miller was working his way through high school. A month or two later, Winbolt told Rhodes that Speer had applied for a job with the Omaha police department. Rhodes did not think Speer would get the job and began leaving gifts for Speer in September or October 1985. These gifts included blue jeans, shirts, a cassette player, a

leather jacket, cards, and concert tickets. Rhodes characterized the gifts as "basically charitable contributions" which were given to Speer on a seasonal basis.

Speer testified that in September or October 1985, he noticed that various gifts were being left in his car outside the Tumbleweed Cafe. Speer and Miller speculated that their benefactor was Rhodes. Speer testified that Miller stopped receiving gifts about a month after Speer started receiving them.

In late May and early June 1986, Speer was involved in two incidents of trespassing and vandalism at a drive-in theater near Broken Bow. A large "86" had been spray painted on the back of the theater screen. Rhodes received the police report of the incidents and spoke with Speer about his activities at the drive-in theater.

The Criminal Mischief Complaint

In late June 1986, Rhodes and Speer met in Rhodes' office to discuss the damage to the drive-in theater. Speer testified that Rhodes talked to him at the cafe and asked Speer to come to the office. Speer went to Rhodes' office the next day. During their conversation, Rhodes said, "I'm sure by now you figured I'm the one that was leaving you the gifts."

Rhodes' recollection was that when he spoke with Speer about the drive-in theater incident, Speer "admitted it." Rhodes said he would file a charge and dismiss it at the end of the summer if Speer stayed out of trouble. According to Rhodes this was a standard practice of his. The record shows that Rhodes made the same agreement

with the defendant in *State v. Chris Mills*. Rhodes also suggested that Speer think about going to college. During this conversation, Rhodes also asked Speer to go to a concert in Omaha with Rhodes and Mr. and Mrs. Carl Speer. Rhodes said he would pay for the trip.

Speer's version of the conversation was that Rhodes talked about being friends with Speer's older brother, Carl Speer, who was a police captain in Broken Bow. According to Speer, Rhodes said, "Well, your brother is running for sheriff and I am helping him run, and too many people know about this deal up at the drive-in, so if I don't file charges against you it will look bad for your brother when the election comes around." Speer testified that Rhodes said he would forget "everything else that was involved in the deal" and would charge Speer with criminal mischief. Speer also stated that Rhodes told him to ask for a continuance when the hearing date came up, that Rhodes would ask for a continuance when it came up again, and that Rhodes would drop the charge after "it kind of fades out of everybody's mind." Speer claimed that Rhodes told him he would not need an attorney because the charge was going to be dropped.

On July 3, 1986, Rhodes filed a complaint for criminal mischief in the Custer County Court against Speer (docket 38, No. 684) for the incident at the drive-in theater which occurred June 4, 1986. Rhodes testified that although other individuals were involved in the incident, he filed the charge against Speer because Speer's car had been traced. Another factor Rhodes considered was that Speer was in his twenties and was an Army veteran; the other individuals were younger and included juveniles.

The court file in the case shows that two continuances were granted at the defendant's request, concurred in by the county attorney.

Rhodes testified that some time after the criminal mischief case was filed, Rhodes told Daniel Speer that he was making contributions to Carl Speer's sheriff's campaign. Rhodes testified that he contributed \$4,700 to Carl Speer's campaign. Carl Speer's campaign budget totaled \$5,000. Rhodes said that when the campaign was over, he would have some money available to help Daniel Speer with college expenses, and offered to pay Daniel Speer's expenses for a year or so. Rhodes stated that the criminal mischief case had been settled as between Rhodes and Speer, but acknowledged that the case was still pending on the court docket as part of that settlement.

In early July 1986, Rhodes spoke with Speer in Rhodes' office about a report of an assault, but Speer denied any wrongdoing. During this conversation, Rhodes offered to help Speer with college expenses and asked if Speer wanted to go on a trip to Omaha.

The Omaha Trip

On July 26, 1986, Rhodes went to Omaha with Daniel Speer and Mr. and Mrs. Carl Speer to attend a concert. Rhodes drove his car and paid for the meals and the night's lodging for the entire party. Rhodes testified that he first asked Carl Speer and his wife to go to the concert, but later it occurred to him that Daniel Speer might want to go. Rhodes and Daniel Speer shared a hotel room.

Daniel Speer testified that the day after they arrived in Omaha, Rhodes talked to Speer about attending college and showed Speer his own college transcripts. Rhodes apparently denied showing Speer his transcripts. According to Speer, Rhodes discussed Speer's attending Kearney State College and said he would help Speer pay his college expenses and make Speer's car payments while he was in college.

Rhodes admitted that the Omaha trip occurred while the criminal mischief case was pending and that he paid for the lodging, tickets, and transportation. Rhodes also admitted asking Speer if he wanted to go to college.

On July 27, Rhodes asked Speer if he wanted to go to the world's fair in Vancouver, British Columbia. Rhodes offered to pay for the trip and said that the only money Speer would have to take was in case he wanted to buy souvenirs for himself or friends. On July 30, Speer came to Rhodes' office and said he wanted to go to Vancouver. Rhodes made the airline reservations on July 30 and purchased the fair tickets a couple weeks later. Rhodes testified that he and Speer planned their travel itinerary together.

Sexual Assault Investigation

Approximately 1 week after the Omaha trip, Rhodes spoke to Speer about a sexual assault of a child. Rhodes testified that Deputy Sheriff Tom Mayo was investigating another individual, Ricky Ross, for first degree sexual assault of the victim. Mayo told Rhodes that the victim had sex with several others, including Speer. A police

report dated July 26, 1986, indicates that Speer was having sex with an underage girl. Rhodes testified he mentioned this information to Speer because

the settlement [on the criminal mischief case] was that he would stay out of trouble; and also there was another incident where there was a police report that showed [Speer had] brought a girl home at 3:30 in the morning, and I was beginning to wonder what was going on with him.

Rhodes testified that he called Speer to the office to see if he would lie about the incident and that the purpose of the meeting was to warn Speer that Rhodes had been getting these reports and to explain the concept of statutory rape to Speer.

On August 8, 1986, Rhodes saw Speer at the Tumbleweed Cafe and asked Speer to come to the county attorney's office to discuss a new police report.

Rhodes testified that on August 22, 1986, he discussed with Speer a potential prosecution involving a sexual assault allegedly perpetrated by Ricky Ross on a minor. Rhodes explained that he showed Speer the police report because Rhodes heard that Speer had also done something like that. During the conversation, Rhodes told Speer he assumed the victim's sexual relations with Speer were consensual. Speer then admitted that he had sex with the minor child.

During the August 22 conversation, in an effort to impress upon Speer the seriousness of such cases, Rhodes asked Speer if he wanted to go to the Supreme Court to see a hearing where the husband was charged with first degree sexual assault. Rhodes also wanted to show Speer

the University of Nebraska campus. Speer said he would like to go.

On September 5, 1986, Speer told Rhodes he had to work on September 11, the day Rhodes was planning to go to Lincoln, but would have some time off the following Wednesday and Thursday and would like to see the university then.

The Lincoln Trip

Rhodes and Speer drove to Lincoln on September 17, 1986. Rhodes testified that the purpose of the trip was for him to go to the law library and to show Speer the University of Nebraska campus. Rhodes paid the expenses of this trip, including transportation, meals, and two nights' lodging. Rhodes also bought school clothes for Speer, including shirts, pants, and socks, which cost approximately \$160. Rhodes testified that he offered to pay Speer's college expenses because although Speer was "not what you would call a nice person," he was Carl's brother, and Rhodes felt sorry for him working at the Tumbleweed.

Speer testified that during the Lincoln trip Rhodes said it would be better if they did not mention to anybody that they were friends and going on trips because it could cause him (Rhodes) some problems. Rhodes denied telling Speer to keep their trips quiet. Speer said that Rhodes then showed him a newspaper article about an Omaha judge who got into trouble for fixing traffic tickets for his son-in-law. Rhodes testified (apparently regarding this conversation) that in the summer of 1986, he had a conversation with Speer about a judge who had

gotten into trouble for trying to help his son. The purpose of the conversation was to tell Speer that he could not rely on the fact that his brother was a police captain to keep him out of trouble.

At his September 23, 1986, arraignment in the criminal mischief case, Speer appeared pro se, pled not guilty, and waived his right to counsel. Rhodes appeared as county attorney. Speer testified before the referee that he kept expecting Rhodes to postpone the hearing date, "and it was getting to the point that I was thinking . . . he's made the whole thing up so that I wouldn't get an attorney." Rhodes explained to Speer that the hearing was just to set a trial date and told Speer that all he had to do when the judge asked for a plea was say "not guilty." Then Rhodes said Speer could postpone the trial until the charge was dismissed. Speer testified that on September 23 Rhodes "vaguely hinted" at dismissing the charge.

Rhodes' testimony indicates that he told Speer to "just go up and ask the court for" a postponement. Rhodes denied discussing a scheme or plan on how to get the case continued, stating that he merely told Speer that he could ask for a continuance if the case came up before the summer ended and that he would agree to a continuance.

Rhodes and Speer left for Vancouver the following day. The record shows that the criminal mischief case against Speer was dismissed that day (September 24) because the plaintiff "show[ed] the Court that the confession obtained from the defendant is not admissible as evidence for the reason same was induced by a promise."

Rhodes testified before the referee that the case was dismissed because the arresting officer had made a promise and certain statements could have been suppressed. The police report attached to the State's motion for dismissal does state: "Suspect Speer upon learning of no charges did fully admit his part in the incident and the painting [of the drive-in theater]." Rhodes also reiterated that his original agreement with Speer was that the case would be dismissed if Speer stayed out of trouble for the summer.

The Vancouver Trip

On September 24, Rhodes and Speer flew from Omaha to Seattle, spent the night in Seattle, and drove a rental car to Vancouver. They rented a hotel room, spent two nights in Vancouver, and attended the world's fair. Speer testified that during the second night in Vancouver,

Mr. Rhodes kept sliding in bed up next to me, and I'd move away from him. I didn't think anything about it as long as I could keep moving away from him. Then he slid up next to me and he put his arm around me. So I got up and I told him, I think the way I put it was "I'm not like that, and if you don't stay away from me I'll kick your ass." And Mr. Rhodes said, "But I thought you understood I loved you."

Speer testified that he then slept on the couch or a chair in the hotel room. Rhodes vehemently denies this incident.

Speer testified that during the Vancouver trip, he and Rhodes again discussed the alleged sexual assault of the minor child by Ricky Ross.

The record contains Rhodes' letter of September 24, 1986, informing Speer that the criminal mischief charge had been dismissed. The letter is on Rhodes' business letterhead and states only that "I have enclosed herewith, your formal notice that I have dismissed the above-referenced case." A "nolle prosequi" dated September 24, 1986, was enclosed with the letter. Rhodes testified that he gave the letter and nolle prosequi to Speer on September 24 when he picked Speer up at Speer's house to go to Vancouver. Speer testified that Rhodes delivered the documents to him in Vancouver, saying, "I was saving this for a special occasion, but you might as well have this now." Speer stated that Rhodes then invited him on a trip to the Bahamas.

Speer and Rhodes returned from Vancouver on September 29, 1986, via Omaha. Speer claims to have been surprised and upset at the prospect of spending the night in Omaha with Rhodes. Rhodes says that he and Speer planned the trip together and that Speer planned all along to spend the night in Omaha. Rhodes testified that on the way between Omaha and Broken Bow, Speer invited Rhodes to attend the Oklahoma-Nebraska football game. Rhodes accepted and invited Speer to go with him to a law enforcement seminar or investigator's school if Rhodes did not have a trial scheduled for the day of the seminar. The record contains a tape recording of Rhodes' subsequent telephone conversation with Speer after returning from Vancouver indicating that the *Haumont* jury trial was off and that Rhodes could go to the seminar. Rhodes recalled that he also discussed Ricky Ross' preliminary hearing with Speer during the drive from

Omaha to Broken Bow and that Speer admitted sexual penetration with the victim in the Ross case.

Conflict Develops Between Rhodes and Speer

Speer testified that after returning from Vancouver, their relationship changed in that Speer now tried to avoid Rhodes. Speer said he talked to Rhodes as little as possible, but that Rhodes made telephone calls to him after the Vancouver trip. Speer believed that Rhodes "kind of had me over a barrel" in that Speer was worried the criminal mischief charge would be refiled.

Around the time he and Speer returned from Vancouver, Rhodes discovered that Speer had been "secretly going out late at night" with a girl who was in grade school. Rhodes also had received information that Speer had been window peeping and had sexually assaulted several other girls. Rhodes did not have any written reports regarding two of them, but the record shows that Bradley Roth, special prosecutor, subpoenaed them in the sexual assault case filed against Speer. Rhodes explained that Deputy Mayo had been investigating Ricky Ross in connection with a sexual assault and had talked about the victim's having sex with a number of men, including Daniel Speer. After returning from Vancouver, Rhodes heard that Speer had been investigated by the Ansley marshal for sexually assaulting a grade school girl. Rhodes referred the latter investigation to the Custer County sheriff's office at the end of the first week in October.

Rhodes testified that Speer did not act angry with him until a week after they returned from Vancouver. He

acknowledged that Speer seemed to be avoiding him, but Rhodes did not know why. When Rhodes asked Speer what was going on, Speer walked away. Rhodes then wrote Speer several notes and sent him a Mailgram asking what was going on. The notes were left in Speer's car while Speer was at work.

Exhibit 10 contains a greeting card and four letters. Exhibit 11 is a final draft of the last letter in exhibit 10. In the first letter, Rhodes refers to his hope that Speer would go to college and to the "happy times" they had together in Omaha, Lincoln, Seattle, and Vancouver. In the second letter, Rhodes refers to enclosing a shirt as a souvenir "to remember some of the fun trips that we took." Rhodes then invited Speer to go to a Billy Joel concert - "Then of course after the trip you could always go back to being mad at me if you wanted to." Rhodes' third letter refers to enclosing a book covering "the top professional law enforcement agencies such as the FBI" and states that Rhodes had a line on a job opening up if Speer decided against going to college. The fourth letter, exhibit 11, recalls "the events which occurred on the day that you stopped speaking to me," including Ricky Ross' preliminary hearing, Rhodes' leaving a Halloween card in Speer's car, and Rhodes' discussing the Vancouver trip with Donna Winbolt and Speer's mother. The letter also states:

When I received a police report from your brother which stated that on a certain night you had been out with Misty Parker and that she had been beaten up, I did not simply jump to the conclusion that you had assaulted [sic] her and file an assault [sic] charge, but instead, I gave you an opportunity to explain and you had

a simple explanation [sic] which cleared up the matter.

Rhodes testified that on or about October 3, he encountered Speer at the Tumbleweed Cafe. On that occasion, Rhodes observed that Speer had an "intense glare" on his face and glared at Rhodes while Rhodes ate. On another occasion in the cafe, Rhodes tried to talk to Speer, but Speer ran from the room. Rhodes concluded that Speer was upset because Rhodes had reported him to the sheriff's office in conjunction with the sexual assault investigations.

The Burglary Charge

In late November 1986, Rhodes received a police report regarding two of the sexual assault victims. On November 26, Rhodes filed a burglary charge against Speer in connection with a May 30, 1986, incident at the drive-in theater. Rhodes testified that the basis of the charge was breaking and entering the drive-in theater with the intent to commit a felony. The charge was based on the same police report which led to the earlier criminal mischief charge against Speer. The police report involves two separate incidents which occurred 5 days apart. Rhodes testified that he did not receive additional police reports about the incidents at the drive-in theater, but had done more legal research which would help him develop evidence regarding breaking and entering. Rhodes stated that after he realized Speer was a child molester, he felt that "something had to be done to get him corrected." After doing research, Rhodes realized he could offer immunity to a potential codefendant, Dusty Parker, and decided to file a burglary charge.

The burglary complaint was dismissed without prejudice on January 13, 1987. Rhodes testified that he dismissed the burglary complaint because Parker was in the military and was unavailable to testify.

Rhodes had filed charges for criminal mischief and trespass against Dusty Parker on December 29, 1986, for an incident which occurred May 21, 1986, at the drive-in theater. Rhodes testified that he filed charges against Parker after Parker boasted about having gotten away with it. Steven Stumpff was appointed special prosecutor in that case on May 16, 1988, and dismissed the charges without prejudice on that date because Parker was in the Air Force and was a military policeman. Stumpff stated that no property was destroyed on the night Parker was at the drive-in theater and that he believed Parker had grown up.

The Felony Charges

In early December 1986, a Deputy Sanchez delivered to Rhodes the written statement of Jerod Beck, a 16-year-old, about an incident involving Speer. In his statement, Beck reported that on the night of February 28, 1986, Speer forced Beck to the ground with a 3-foot stick, threatened to dislocate Beck's shoulder, and forced Beck to accompany Speer in Speer's automobile. Rhodes' exhibits indicate that in late December, he discovered that Jerod Beck's brother, Aron Beck, intended to sue the city for an alleged civil rights violation. The basis of the suit was that Aron Beck had been detained outside the city limits by the Broken Bow police for driving while intoxicated. Aron Beck claimed he was denied equal protection

of the law because no action was taken on the assault committed on Jerod by the police captain's (Carl Speer's) brother inside the city limits. Rhodes then offered to prosecute Speer for the attack on Jerod Beck rather than to prosecute Aron Beck for driving while intoxicated.

On January 12, 1987, Rhodes filed felony kidnapping and false imprisonment charges against Speer for the Jerod Beck incident. Speer testified that he was arrested and spent the night in jail. Speer appeared pro se at his bond hearing in county court the next morning. Rhodes requested that Speer be allowed a signature bond. The county judge, however, required Speer to post 10 percent of a \$3,000 bond.

Speer Threatens Rhodes

Rhodes testified that Speer began threatening him in January 1987 and that Rhodes began carrying a pistol around the time the felony charges were filed. Rhodes also noted that Speer had been caught with weapons after making some of the threats. Until that time, Speer had not physically threatened Rhodes. Speer admitted that he threatened Rhodes in Vancouver, but stated that he made no other threats against Rhodes.

Rhodes continued to frequent the Tumbleweed Cafe. Speer testified that at some point in time he became aware that Rhodes was carrying a pistol in the cafe. Speer stated that Rhodes would come into the cafe wearing a three-piece suit, stand within Speer's sight, take his jacket off, and adjust his holster. Rhodes admitted taking his pistol to the cafe. Speer also complained that Rhodes

began to follow him in his automobile. Rhodes denies following Speer.

On January 23, Speer threatened to assault Rhodes, prompting Rhodes to withdraw from the Speer prosecutions.

Rhodes testified that on the Thursday preceding January 26, 1987, Speer had been following Rhodes in his car "very close." On Friday, when Rhodes was at the Tumbleweed, Speer told another cook that Rhodes looked like a fag. When Rhodes returned to the cafe later in the day, Speer pointed at him and said, "Look at him, I really had him on the run last night. Next time I'm going to beat his ass; I don't care; I'll get probation anyway; that's nothing, I've been on probation to [Probation Officer] Kawata before." Speer also said, "I'm really going to get even."

Appointment of Special Prosecutor

Rhodes approached attorney Bradley Roth on January 25, 1987, and informed Roth that he had been threatened by Speer and was going to withdraw as county attorney in the Speer prosecutions. Rhodes wanted Roth to be appointed special prosecutor in the cases. Roth testified that during this conversation, Rhodes did not indicate he had a personal relationship with Speer, but that Rhodes' fear of Speer appeared to be real.

Roth was appointed special prosecutor on January 26, 1987. Roth and Rhodes discussed the charges pending against Speer, other potential charges, and whether the charges should be plea bargained. Roth testified that Rhodes said that "I [Roth] would have no respect for him

[Rhodes] if I reduced the felony charges to something lower." Rhodes then explained in detail some efforts he made to help Speer. Rhodes did acknowledge that it was within Roth's discretion to dispose of the charges filed against Speer.

Roth dismissed the kidnapping charge without prejudice on January 27. Roth agreed that the kidnapping charge (which had been filed by Rhodes) was technically correct but felt that, being inexperienced, he might not have been able to get a conviction. Speer's attorney, Kent Schroeder, informed Roth that Speer would be willing to plead guilty to a Class I misdemeanor at the preliminary hearing on the false imprisonment charge. Roth apparently rejected this offer, and Speer was bound over to district court on the charge of first degree false imprisonment. On January 30, 1987, Roth filed an information in district court charging Speer with the first degree false imprisonment of Jerod Beck and attempt to deliver alcohol to a minor. Speer's plea in abatement was overruled on May 1, 1987.

On February 17, 1987, Roth filed a complaint charging Speer with first degree sexual assault of a child and corresponded with Rhodes about the charge. In his letter, Roth indicated he had subpoenaed two girls who were the subjects of the sheriff's investigation and asked Rhodes to "please let me know if you can think of any other witnesses I should be subpoenaing." Rhodes advised Roth that there was not enough evidence to get a conviction. After a jury trial, Speer was acquitted on this charge. Rhodes argues that Speer's acquittal "shows that I was still able to assess the cases fairly well."

Roth noticed that shortly after he was appointed special prosecutor, Rhodes began keeping weapons in his office and appeared to be genuinely afraid of Speer. Speer testified that he (Speer) owned an assortment of firearms, including a 20 gauge shotgun, a .35 Remington rifle, a .22 revolver, and possibly a .357 Magnum revolver.

On February 27, 1987, Speer attempted to buy a pistol at Gibson's Discount Center. William Linder, a clerk at Gibson's who waited on Speer, testified that Speer purchased a semiautomatic pistol with a 6-inch barrel and falsified a federal form in order to purchase the gun by stating that he was not currently charged with a felony. Linder called the police department after being advised by a coworker that felony charges were pending against Speer. The gun was then returned to the store approximately 15 to 30 minutes after Speer purchased it.

Rhodes testified that Speer tried to purchase this weapon after threatening Rhodes. Rhodes became aware of the purchase after receiving a call from the police department about Speer's false statement to purchase a firearm. Rhodes referred the matter to Roth, but did not notify federal authorities of Speer's gun purchase. Nevertheless, Rhodes felt that Speer was dangerous because "he was pulling all these things and getting away with them." Convinced that Speer was trying to kill him, Rhodes went to Gibson's and purchased the gun himself.

Rhodes testified that on March 9, 1987, Speer threatened to slit his throat. On April 17, 1987, Rhodes saw Speer purchase 500 rounds of regular .22 ammunition and 100 rounds of hollow point ammunition at Gibson's. Cindy Cole, a clerk at Gibson's, testified that Speer was

alone and paid for the ammunition in cash. Rhodes was alarmed because this ammunition would fit the gun that had been taken away from Speer. Rhodes reported the purchase to the sheriff's office. He testified to an incident at the Tumbleweed where Speer pointed at Rhodes with his hand formed like a gun. A written exhibit offered by Rhodes states that in April 1987, "Speer threaten[ed] to blow my head off with [a] firearm." At this time, the false imprisonment and sexual assault charges were pending against Speer, with Roth as special prosecutor.

Rhodes' Behavior Toward Special Prosecutor

In April or May 1987, Roth told Rhodes that he was considering reducing the false imprisonment charge against Speer to two Class I misdemeanors. Roth testified that Rhodes was not pleased and did not think it was a proper plea bargain. On May 21, 1987, Roth filed an amended information charging Speer with third degree assault. Pursuant to a plea agreement, Speer pled guilty to third degree assault, and the false imprisonment charge was dropped.

After Speer entered his guilty plea, he prepared a typewritten statement regarding the incident. Beginning at page 4 of his statement, Speer discusses the gifts given to him by Rhodes, the Omaha trip, Rhodes' offers to pay Speer's college expenses, and the incident in Vancouver. Speer stated at page 6 that he was charged with kidnapping and false imprisonment because Rhodes "was using this incident to gain revenge against me for turning down his advances towards me."

Roth testified that after the plea agreement, his professional relationship with Rhodes became strained. Rhodes barely spoke to Roth after Speer's plea was accepted. For example, Rhodes began sending everyday correspondence to Roth by certified mail, made many objections to Roth's motions and discovery requests, would not give Roth access to police reports, and indicated there would be no more plea bargains on felony cases. The policy on plea bargaining extended to other attorneys besides Roth. Rhodes also began objecting to Roth's fees as a court-appointed attorney. Rhodes believed that Roth was charging the county excessive fees and was using work product which he was gaining as an attorney for the State and using it against the State.

Rhodes remained frightened of Speer. One day in June 1987, Rhodes observed Speer at the cafe in a "shaking rage." That evening, Rhodes wore a shoulder holster to the cafe and heard Speer yelling in the kitchen. Rhodes' food was late, so he put his feet up and read a newspaper. Speer appeared and told Rhodes to put his feet down. When Rhodes paid for his meal, he took his jacket off so Speer could see the holster. Rhodes testified, "I thought if he realized I was armed, he would be less likely to go ahead with an attack." Speer called the police. An officer came and spoke to Speer, but not to Rhodes.

The Rattlesnake Incident

Rhodes reports that he was threatened by Speer on August 12, 1987. The following day, Rhodes traveled to Lincoln to meet with an assistant attorney general about a complaint by Speer against Rhodes. When Rhodes

returned from Lincoln, he was informed by Deputy May that a rattlesnake had been confiscated from Speer. Rhodes noted that Speer had a set of Rhodes' car keys which he had obtained during the Omaha trip and that a week or 10 days prior to the rattlesnake incident, Rhodes discovered a mouse in the trunk of his car. Rhodes believed that Speer intended to kill him with the rattlesnake.

Speer testified that he captured the rattlesnake at his girlfriend's house and kept it in an aquarium in his bedroom and that he did not even have the snake for a full day. Speer's mother found the snake and told Carl Speer to take it away. Carl called and asked Daniel Speer if he wanted the snake. Daniel Speer said he did not. Carl Speer then killed the snake. They cooked it and ate it. Daniel Speer stated that he did not intend to use the rattlesnake to kill Rhodes.

Deposition of Cindy Ash, September 16, 1987

The record shows that Rhodes and Roth deposed Cindy Ash in the case of *State v. Coleman*. Roth represented the defendant, Pete Coleman, also known as Rufus Two Two. During the deposition, Roth observed a 12-inch bayonet on the table with Rhodes' materials. The bayonet was covered with a sheath. Roth did not recall whether Rhodes handled the bayonet during the deposition, but testified that the bayonet was not marked as an exhibit or used in the deposition. Roth testified on cross-examination that he was not threatened or intimidated when he saw the bayonet.

David Francis, the court reporter who recorded the Ash deposition, testified that he noticed a large knife on the counsel table in the courtroom. Francis testified that when Roth entered the courtroom and asked Rhodes what the knife was for, Rhodes replied, "That's for you in case you make me mad." Francis characterized Rhodes' statement as an attempted joke. Francis further testified that Rhodes handled the knife during the deposition, holding it with the blade pointed up, and that he (Francis) became apprehensive when he realized the knife had nothing to do with the deposition.

Rhodes testified that he had a collection of antique Swedish military equipment, that he had brought the bayonet from home to put in his office, and that the bayonet was in the courtroom because he went from home directly to the courtroom. He recalled looking at the knife before the deposition, but did not recall looking at it during the deposition. Rhodes remembered Francis' commenting on the bayonet when Rhodes was looking at it while waiting for Roth. Francis asked what the bayonet was for. As a joke, Rhodes said, "Well, it's for Brad." Rhodes eventually gave the bayonet to Carl Speer as a gift. Rhodes admitted the bayonet had nothing to do with the deposition. He thought that since he and Roth had been "going around" on Roth's claims with the county, it was a joke that Rhodes would give Roth a gift, considering the fees Roth was charging.

Deposition of Daniel Speer, September 16, 1987

The record shows that Rhodes was the prosecuting attorney in *State v. Larry L. Rush*, in the district court for

Custer County. Rush was charged with possession of a burglar's tool, "criminal attempt," and criminal mischief. The defendant moved to depose Speer and others pursuant to Neb. Rev. Stat. § 29-1917 (Reissue 1985). Rhodes also moved to depose Speer because Speer had been twice imprisoned with the defendant and was "believed to be in possession of incriminating admissions" made by Rush. On September 3, 1987, the district court granted both parties' motions to depose Speer in the Rush prosecution.

The Speer deposition was taken on the afternoon of September 16 in the district courtroom in Broken Bow. At Rhodes' request, Francis and his assistant recorded this deposition on videotape. Rhodes requested that he not appear on the videotape. Francis testified that such a request was not unusual. At defense counsel's request, however, Francis' assistant turned the video camera to show Rhodes' demeanor in the courtroom. Rhodes testified that he had the deposition videotaped to deter "something" and sat at the judge's bench during the deposition because he thought Speer might pull a weapon. Rhodes also took the nameplate from his office and put it on the judge's bench. Rhodes did not believe it would help to have a sheriff in the courtroom or that there were legal grounds to have Speer searched.

Francis observed that Rhodes had changed from a light-colored summer suit and appeared that afternoon wearing dark blue trousers with a yellow stripe down each leg. Rhodes' coat was like a uniform coat, and he was wearing a white shirt and black tie. The coat had a badge on the left breast pocket and a medal on the right. Rhodes also was wearing a gun with a long barrel. The

gun originally was in a holster sitting on a chair in the courtroom. Francis testified that Rhodes later strapped the holster around his waist. Rhodes did not recall putting on the gun and holster in the courtroom. When Francis asked Rhodes what he was doing, Rhodes said that there was a court rule that any officer who wore a firearm in the courtroom must be in uniform. The weapon was a "686 Smith and Wesson stainless steel" and was loaded.

Rhodes admitted that he wore a law enforcement uniform to the deposition. He had purchased the uniform from a catalog and claims he was entitled to wear a uniform because, pursuant to the statutes, he is a coroner with the duties of a peace officer. Rhodes testified that he did not order the uniform specifically for the Speer deposition. He believed that Speer had mental problems and that Speer would try to get even with Rhodes.

Rhodes testified that he began to carry a small pocket pistol after being threatened by Speer and that Speer's deposition was originally scheduled to be held in the board of supervisors' room, where Rhodes could carry his pocket pistol. Rhodes once again noted that Speer had threatened his life several times, had been caught with weapons, and had been in the military police. Rhodes explained that he thought Speer might think twice about killing a law enforcement officer as opposed to a regular person and ordered the uniform thinking that on Halloween he would go out in uniform and make an impression on Speer that "this is a peace officer you're trying to kill." Rhodes did wear the uniform and badge on Halloween.

At this time, Rhodes usually carried a firearm because of Speer's threats. Rhodes stated that the rule of the district court was that only uniformed officers could wear sidearms in the courtroom. He decided on the spur of the moment to wear the uniform to the deposition so he would comply with the court rule regarding sidearms. The uniform arrived by United Parcel Service the same day as the Speer deposition and was delivered to the courthouse after lunch. Rhodes changed into the uniform in his office and put on a badge that had been given to him by law enforcement officers. He also wore a "mock trial group" medal.

During the deposition, Rhodes began questioning Speer about how he and Rhodes had met. Rush's attorney objected to the line of questioning on the grounds of relevancy, but Rhodes claimed the questions were foundational to show that Speer was a hostile witness. Rhodes explained to the referee that he was trying to talk Speer out of his anger and get him to cooperate at the deposition.

The record of the deposition contains approximately 40 pages of testimony elicited by Rhodes on topics including the drive-in theater incident, why Speer never went to college, the Omaha concert trip, the trip to Vancouver, conversations at the Tumbleweed Cafe, conversations regarding a sexual assault victim and Ricky Ross, the trip to Lincoln, alleged homosexual advances made by Rhodes, Rhodes' attempts to talk to Speer after the Vancouver trip, one of the sexual assault incidents, the Jerod Beck kidnapping/false imprisonment incident, the criminal charges filed by Rhodes against Speer, issues of constitutional law with respect to civil rights actions, the

disposition of charges against Speer by Roth, Speer's purchase of a gun at Gibson's, and Speer's visits to a psychiatrist. Rhodes then stated to Speer during the deposition that "maybe he [Rhodes] is trying to make a point that he [Rhodes] wasn't out to lock you [Speer] up forever."

Only approximately two pages of the deposition testimony are devoted to Rhodes' questioning Speer about statements made by the defendant, Larry Rush, in the jail.

Speer testified that he appeared pro se at the deposition, but that Rush's attorney, Gary Washburn, told him not to talk to Rhodes until Washburn was present. Speer described Rhodes' attire as a blue "sports jacket" with a badge and medal and testified that Rhodes was carrying a weapon. Speer stated that he was not frightened, but was embarrassed by Rhodes' questions about their personal relationship.

Rhodes now admits the deposition in the Rush case probably was not a very good idea. He stated before the referee that he would not be dressing up in any uniforms in the future and that he only wore the uniform because he was afraid of Speer. Rush's attorney, Gary Washburn, testified at the referee's hearing that Rhodes' manner was very calm during the Speer deposition and that the only loud or boisterous language came from Speer.

Discovery Dispute With Roth

On September 18, 1987, Roth and Rhodes were to exchange discovery items in the district courtroom pursuant to a reciprocal discovery order entered in *State v.*

Hunsaker. Roth testified that when he arrived at 1 p.m., Rhodes was already in the courtroom, sitting in the front jury seat. Rhodes was wearing a suit, his coat was buttoned, and he was staring straight ahead with a "glazed" look on his face. Prior to this occasion, Roth had seen Rhodes carrying a pistol "on his side" and in a shoulder holster. Roth was concerned that Rhodes was carrying a gun. Roth asked Rhodes if he had any of the discovery materials. Rhodes pointed at items sitting on the ledge in front of him. As Roth walked over to the jury box, Rhodes pushed the items over the ledge so that two documents fell on the floor. The items consisted of a telephone directory, a letter from Rhodes, and the bill of exceptions from Hunsaker's preliminary hearing. There were no police reports. Rhodes gave Roth the telephone book so that Roth could look up the witnesses' addresses himself.

Roth testified that the judge had specifically ordered that the police reports be provided. After Roth asked for the police reports, Rhodes responded very sternly, "I'm not giving you the police reports until I get your witness list." Roth said it was his understanding that he did not request a witness list from Rhodes, so Roth did not have to provide a witness list.

Rhodes continued to refuse to provide the police reports. When Roth asked if he had anything else, Rhodes appeared to lose control. Roth testified that Rhodes "came up over the jury box very rapidly with his arms waving and made a loud noise, coming directly at me. . . . He made a loud, 'Gerr-rr-rr.'" Roth was stunned and took off and ran around the counsel table. Rhodes did not follow him, but headed toward the back of the courtroom, turned around, and said, "You chicken shit."

Rhodes denies calling Roth a chicken shit. There were no other witnesses to this incident. Roth testified that he was "extremely scared" and that he left the courtroom to discuss the incident with Jeff Kawata, a probation officer. Roth returned to his office and prepared a memo for his file about the incident.

Rhodes testified that there was a reciprocal discovery order in the *Hunsaker* case and that he and Roth had a disagreement about the defendant's witness list and the police reports. Rhodes said he became exasperated and said, "This is chicken shit." Rhodes denied sitting in the jury box and jumping over the jury box. Roth's partner was eventually ordered to give the State a witness list in the case.

Roth testified that he was concerned for his own personal safety from the time he reduced the felony charges against Speer until this incident in the courtroom. Roth and his family began to lock all their doors at home. Roth stopped working in his office at night and made sure that discovery exchanges were made in the presence of a judge. Roth stated that he considered leaving Broken Bow as the result of Rhodes' conduct.

Further Contacts With Speer

Speer continued to threaten Rhodes during the fall of 1987. During Christmas 1987, however, Rhodes gave Speer a leather jacket, several magazine subscriptions, a shirt, a movie, a book, cologne, and \$50 cash. Speer estimated the value of these gifts to be \$600. Rhodes gave the gifts to Carl Speer, who forwarded them to Daniel Speer. Daniel Speer never returned any of Rhodes' gifts.

Rhodes also bought Carl Speer a "Colt 45 Officers Model" that cost \$455. Rhodes thought that if he got Daniel Speer a Christmas present, Speer would settle down and quit trying to kill him.

On January 7, 1988, Rhodes signed up for Tae Kwon Do classes after finding out that Daniel Speer had enrolled. Rhodes did not want Speer to "get the upper hand on me, become physically superior to where he could destroy me hand-to-hand." Carl Speer and Deputy Mayo also took the classes. Rhodes continued the classes even after Daniel Speer dropped out.

In April 1988, about 1 week before Daniel Speer's birthday, Speer threatened Rhodes after Tae Kwon Do class. Speer said he was "good with a gun, with an M-16, and good with a 45." Speer threatened to shoot Rhodes and stated that when he did, it would be a kidney shot so that Rhodes would really suffer. Rhodes testified that by this time he was not afraid of Speer anymore and decided to buy him a birthday card.

On April 14, Rhodes gave Speer a birthday card containing \$50. The card depicted a cartoon character holding a can of spray paint and reminded Rhodes of what Speer had done at the drive-in theater. Rhodes said he sent the card as a way of saying, "You can't get my goat any more; I'm not afraid of you, you vandal."

Credibility of Daniel Speer

The referee concluded that "[t]here is no question but that Daniel Speer, the principal witness against Mr. Rhodes, falsified parts of his testimony and that he was

impeached numerous times on cross examination by Mr. Rhodes' counsel and by the witnesses called for the purposes of impeachment."

Thomas Zimmer, a conservation officer with the Game and Parks Commission, testified that he checked Daniel Speer for a hunting license in the fall of 1984. At that time, the law required that anyone 16 years of age or older had to have a hunting license. Speer lied to Zimmer about his age, indicating that he was only 16, but then produced a driver's license that confirmed he was 21. Speer denied lying to Zimmer.

Michele Taylor, who was 18 years old, testified that on May 23, 1989, she was sunbathing on the riverbank in Pressley Park with her friend, Cathy Russell. Taylor and Russell saw Speer standing on the other side of the river. The two women then saw Speer drop his swimming suit or underwear and begin "fondling himself." Taylor testified that she did not report the incident to law enforcement because she did not want to go to court and "didn't want all the problems it would cause." Taylor further stated that she was afraid of Speer and did not want to testify against him.

Speer's testimony on cross-examination suggests the possibility that Speer is homophobic and that he was not truthful in his testimony regarding his purchases of a gun and ammunition at Gibson's, the 1984 hunting incident, the Jerod Beck assault, and the incident in Pressley Park. Speer "quit" his job at the Tumbleweed Cafe after assaulting another employee. He was fired from a job at Becton-Dickinson in Broken Bow for lying on a timecard.

The referee found that Speer's testimony relating to the material parts of the case was corroborated by the circumstantial evidence and the reasonable inferences to be drawn from the known facts and the admissions of the respondent, Rhodes. The record supports this finding.

In summary, the evidence shows that sometime during late 1985 and early 1986, Rhodes started to develop a relationship with Daniel Speer. It began by Rhodes' presenting Speer with expensive gifts, contributing \$4,700 to Carl Speer's campaign, offering to pay at least an equivalent amount for Daniel Speer's college expenses following the campaign, and offering to make Daniel Speer's car payments while he was in college. Rhodes also took Speer on trips to Omaha, Lincoln, and Vancouver, all of which Rhodes paid for. Rhodes also discussed with Speer the possibility of trips to Missouri and the Bahamas. All of the essential facts are admitted by Rhodes, although he attempted to explain them away as acts of charity. The expenditures Rhodes made during a relatively short period of time demonstrate a consistent and aggressive effort on the part of Rhodes to develop his relationship with Speer.

While Rhodes was fostering his relationship with Speer, Rhodes was also prosecuting Speer and had filed a misdemeanor criminal mischief charge against Speer in the county court for Custer County. During the various trips they took together, Rhodes discussed cases with Speer involving sexual matters involving not only Speer but also other individuals who were involved with girls in Broken Bow who were under the age of consent. The relationship between Speer and Rhodes was not the type

of relationship between a prosecutor and defendant that can be tolerated in a criminal case.

Rhodes manipulated the criminal justice system against Speer, in violation of DR 7-102, while providing gifts in an effort to establish a relationship with Speer. The effort went from attempting to ingratiate himself with Speer by dismissing relatively minor charges to attempting to coerce and intimidate Speer by filing more serious charges. The conduct of the respondent after the Vancouver trip was erratic at best. Rhodes started writing notes and letters to Speer in an effort to get Speer to talk to him, when it was clear that Speer wanted nothing to do with Rhodes. Rhodes' testimony that his motive toward Speer was charitable because Rhodes was in the habit of helping people is not convincing in view of the record and the lack of substantial evidence of any real effort by Rhodes to help anyone, except Daniel Speer and his brother Carl.

Rhodes' testimony that he was afraid of Speer did not justify Rhodes' conduct. Speer's threats may have been related to what occurred in Vancouver, rather than originating from any prosecutorial action against Speer. There is no adequate explanation why respondent did not prosecute Speer for any of the alleged threats that he made against Rhodes or for the failure to prosecute Speer for other offenses by Speer which Rhodes knew about.

Rhodes' conduct toward the special prosecutor, Roth, and Rhodes' conduct during the deposition was erratic and bizarre. The problems between Roth and Rhodes started only after Roth became active in the Speer prosecutions. Instead of completely withdrawing from those

cases, Rhodes attempted to exert some influence upon Roth.

The evidence shows clearly and convincingly that Rhodes was guilty of misconduct and that he violated the provisions of DR 1-102, DR 2-110, DR 5-101, and DR 7-102.

Rhodes argues that a prosecutor is disqualified only when he is the victim in a case which he prosecutes. This argument lacks merit, and, as the relator points out, such a rule would permit prosecutors to prosecute their close friends and relatives.

In *Kennedy v. L.D.*, 430 N.W.2d 833, 837 (Minn. 1988), the Supreme Court of Minnesota stated, "It is improper for prosecutors to participate in cases which involve personal friends or relatives. . . ." See, also, *State v. Bell*, 84 Idaho 153, 370 P.2d 508 (1962), in which the court held that an affidavit of the prosecuting attorney alleging that the defendant and prosecuting attorney and their families had been close personal friends, that the defendant and prosecuting attorney had had business and political relations in the past, and that it would be difficult for the prosecuting attorney to conduct a trial was a sufficient showing to warrant appointment of a special prosecuting attorney.

In *People v. Doyle*, 159 Mich. App. 632, 636, 638, 641-44, 646, 406 N.W.2d 893, 895-99 (1987), the court said:

The basis of defendants Doyle's, Kardos' and Reynolds' motion for disqualification of the prosecutor for conflict of interest is the personal relationship between Doyle and Dennis Lazar, Chief Assistant Genesee County Prosecutor. Doyle and Lazar are brothers-in-law; their wives

are sisters. The Flushing drug investigation, supervised by the prosecutor's office, began in August, 1984, and implicated Doyle in September, 1984. Doyle married Lazar's sister-in-law around Christmas, 1984.

.....

The basis for defendants Walter Johnson's, Scott Johnson's and Timothy Donaldson's claim for disqualification is that the complaining witness and victim, Danny Lazar, is the brother of Dennis Lazar, Chief Assistant Prosecutor.

.....

The instant cases fall into the second category, which includes situations where the prosecuting attorney has a personal interest (financial or emotional) in the litigation, or has some personal relationship (kinship, friendship or animosity) with the accused. In Michigan, the recusal of a prosecuting attorney who has a personal interest in the case is required by the Code of Professional Responsibility. Canon 9 provides that "a lawyer should avoid even the appearance of professional impropriety." DR 5-101 is arguably applicable:

"DR 5-101. Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

"(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."

.....

Courts around the country recognize two policy considerations underlying the disqualification of prosecuting attorneys for a conflict

of interest. The first policy served by the rule is fairness to the accused. It is universally recognized that a prosecutor's duty is to obtain justice, not merely to convict. . . .

The second policy served by disqualification of a prosecuting attorney for conflict of interest is the preservation of public confidence in the impartiality and integrity of the criminal justice system. *Greer, supra*, p. 268 [19 Cal. 3d 255, 561 P.2d 1164, 137 Cal. Rptr. 476 (1977)]; *Conner, supra*, p. 146 [34 Cal. 3d 441, 666 P.2d 5, 193 Cal. Rptr. 148 (1983)]; 31 ALR3d 953. American courts have consistently held that the appearance of impropriety is sufficient to justify disqualification of a prosecuting attorney. . . .

. . . .

. . . The fact that Lazar is the Chief Assistant Prosecutor and Doyle's brother-in-law creates for Lazar a conflict of interest. There is an appearance of impropriety when Lazar acts in matters concerning Doyle. His family relationship with defendant Doyle is sufficiently incompatible with the interest of the defendant, of the state and of the administration of justice generally so as to require Lazar to withdraw from Doyle's case.

Character References

Roth testified that, as of the time of the referee's hearing, he and Rhodes had gotten along professionally for approximately 1 year. Roth described Rhodes as being courteous and professional and said that Rhodes' bad conduct was out of character.

Howard Spencer, Gary Washburn, and Steven Stumpff, all practicing attorneys in Broken Bow, testified

they were of the opinion that Rhodes was truthful and honest. None of these witnesses had experienced an instance where Rhodes filed criminal charges which were not based on the facts or the law. Rhodes was described as a good criminal lawyer who was well prepared and showed a good grasp of the issues.

Ronald Ruff, an attorney from North Platte whose firm contracts to do public defender work in Custer County, testified that he became acquainted with Rhodes in late 1988. Ruff was of the opinion that Rhodes was well prepared and had a good grasp of the law. Ruff noted that Rhodes was extremely courteous and that he had not noticed any charges filed by Rhodes that were not based on the facts or the law.

Attorneys Carlos Schaper, William Steffens, and Ted Huston also testified that they were of the opinion that Rhodes was truthful, honest, courteous, professional, and competent.

The record also contains letters of endorsement from the following people: Robert Scott, Custer County supervisor; Herbert Buntmeyer, Custer County supervisor; Robert L. Leatherly, Custer County supervisor; Ronald Ruff; W.G. Arnold, D.D.S.; Grayston Cool, Custer County supervisor; Roberta Snyder, teacher; Donald Ellingson, register of deeds; Lea Dell Jones, Custer County treasurer; Eugene Schiltz, Custer County surveyor; Robert Jacobsen, mayor of Broken Bow; Edwin Scott, Custer County supervisor; L.O. Muhlbach, chief of police; Larry Hickenbottom, Custer County supervisor; Bryan Clark, pastor of Berean Fundamental Church; John Finney, former associate county judge and clerk magistrate; Marian

Woodward, Custer County clerk; Leroy Schaad, Custer County assessor; Harry Duryea, Custer County highway superintendent; Max Bristol, Custer County weed control authority superintendent; and Joseph Divis, Blaine County Attorney.

DISCIPLINE TO BE IMPOSED

We find that the respondent violated the provisions of DR 1-102, DR 2-110, DR 5-101, and DR 7-102.

In *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987), we said that the conduct of a government attorney is required to be more circumspect than that of a private lawyer because improper conduct on the part of such an attorney reflects upon the entire system of justice in terms of public trust.

The evidence is unrefuted that during late 1985 and early 1986, the respondent actively cultivated a friendship with Daniel Speer.

During the time respondent was fostering the relationship with Speer, he was also engaged in prosecuting him. During the various trips they took together, respondent discussed with Speer cases involving sexual matters not only involving Speer, but involving other individuals who were sexually involved with girls in Broken Bow who were under the age of consent. The relationship between Speer and the respondent was not the type of relationship that is proper between the prosecutor and the defendant in a criminal case.

The record shows by clear and convincing evidence that the respondent violated DR 5-101(A) by prosecuting

Speer at a time when his professional judgment might reasonably have been affected by respondent's own personal interests and that respondent violated DR 2-110 by failing to withdraw from prosecuting Speer in the criminal mischief case. Respondent also engaged in investigating sexual assault allegations against Speer during the time he and Speer were engaged in a close personal friendship and filed burglary charges against Speer after discovering that Speer was an alleged "child molester."

The respondent's conduct toward Roth and his behavior during the Speer deposition were erratic, extraordinary, and defy propriety. The record sustains this finding, regardless of the motivation for respondent's behavior. The record shows by clear and convincing evidence that respondent violated DR 1-102 by engaging in conduct that was prejudicial to the administration of justice and adversely reflected on his fitness to practice law.

In *State ex rel. NSBA v. Rasmussen*, 232 Neb. 53, 55, 439 N.W.2d 481, 483 (1989), we said:

The nature and extent of discipline to be imposed is determined by a consideration of the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his or her present or future fitness to continue in the practice of law.

The purpose of a disciplinary proceeding is not so much to punish an attorney as it is to determine, in the public interest, whether the attorney should be permitted

to continue to practice law. *State ex rel. NSBA v. Douglas, supra.*

It is significant that several of the respondent's peers testified that he is an able and capable attorney and has discharged his duties as county attorney well in most cases. Also significant is that respondent provided many favorable references from county officials and citizens. These references constitute a mitigating factor but do not exonerate the respondent from his misconduct.

Taking into consideration the attitude of the respondent, in light of the evidence presented and the fact that this matter involves both the respondent's ability to practice law and his ability to discharge the office of county attorney, and based upon the seriousness of the matter, we conclude that the appropriate discipline to be imposed in this case is suspension from the practice of law for a period of 3 years.

JUDGMENT OF SUSPENSION.

WHITE, J., not participating.

NEBRASKA SUPREME COURT
DOCKET SHEET

CASE ACTION SUMMARY

Case Number 89-142

STATE OF NEBRASKA, ex rel.
NEBRASKA STATE BAR ASSOCIATION,
Relator,

VS.

GEORGE G. RHODES,

Respondent.

Dennis G. Carlson
Counsel for Discipline
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P.O. Box 81809
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402-475-7091

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Pauley, P.C.
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Hastings, NE 68902
402-462-5187

* * *

5-9-90 Motion of Respondent For Rehearing
X Overruled Sustained

SUPREME COURT)	
	)	ss.
STATE OF NEBRASKA)	

I certify that I have compared the foregoing copy of a partial docket sheet showing the ruling on the motion for rehearing in the following case: No. 89-142, State ex rel., NSBA v. Rhodes with the original now on file in my office. The same is a correct copy of the original.

SEAL

IN TESTIMONY WHEREOF, I
have hereunto set my hand and
caused to be affixed the Seal of
this Court, in the City of Lincoln,
on July 24, 1990.

/s/ Janet S. Asmussen
Clerk

PERTINENT TEXT OF CONSTITUTIONAL
PROVISIONS PERTAINING TO THIS CASE

I.

THE CONSTITUTIONAL GUARANTEE
THAT EACH STATE SHALL HAVE A
REPUBLICAN FORM OF GOVERNMENT

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or the Executive (when the Legislature cannot be convened) against domestic Violence.

The Constitution of the United States, Article IV, Section 4
(Emphasis Supplied).

II.

THE CONSTITUTIONAL RIGHT TO PROCEDURAL
DUE PROCESS OF LAW IN DISCIPLINARY ACTIONS

If there are any constitutional defects in what the Ohio court did concerning Charge 13, those defects are reflected in what the Court of Appeals decided. The Court of Appeals stated:

"We do not find in the record of the state proceedings, 'Such an infirmity of proof as to the facts found to have to have established the want of . . . [Ruffalo's] fair private and professional character' to lead us to a conviction that we cannot, consistent with our duty, 'accept as final the conclusion' of the Supreme Court and the Ohio bar." *Id.*, at 453.

We turn then to the question whether in Ohio's procedure there was any lack of due process. Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex parte Garland*, 4 Wall 333, 380, 18 L ed 366, 369; *Spevack v. Klein*, 385 US 511, 515, 17 L ed 2d 574, 577, 87 S Ct 625. He is accordingly entitled to procedural due process, which includes fair notice of the charge. See *In re Oliver*, 333 US 257, 273, 92 L ed 682, 694, 68 S Ct 499. It was said in *Randall v. Brigham*, 7 Wall 523, 540, 19 L ed 285, 293, that when proceedings for disbarment are "not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defense." Therefore, one of the conditions this Court considers in determining whether disbarment by a State should be followed by disbarment here is whether "the state procedure from want of notice or opportunity to be heard was wanting in due process." *Selling v. Radford*, 243 US 46, 51, 61 L ed 585, 587, 37 S Ct 377.

In the present case petitioner had no notice that his employment of Orlando would be considered a disbarment offense until *after* both he and Orlando had testified at length on all the material facts pertaining to this phase of the case. As Judge Edwards, dissenting below, said, "such procedural violation of due process would never pass muster in any normal civil or criminal litigation." 370 F2d, at 462.

These are adversary proceedings of a quasi-criminal nature. Cf. *In re Gault*, 387 US 1, 33, 18 L ed 2d 527, 549, 87 S Ct 1428. The charge must be known before the proceedings commence. They become a trap when, after

they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.

How the charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of Commissioners on Grievances and Discipline no one knows.

This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process.

Reversed.

IN THE MATTER OF JOHN RUFFALO, Jr., Petitioner, 390
US 544, 20 L Ed 2d 117, 88 S Ct 1222 (1968).

IN THE SUPREME COURT OF THE
STATE OF NEBRASKA

NEBRASKA STATE BAR)	
ASSOCIATION,)	
Complainant,	)	FORMAL
	)	CHARGES
vs.	)	(Filed Febr. 24,
GEORGE G. RHODES,	)	1989)
	)	89-142
Respondent.)	

COMES NOW the Committee on Enquiry for the Sixth Judicial District, and does herewith file its Formal Charges against the Respondent, George G. Rhodes, and in connection therewith alleges as follows:

1. On the 8th day of April, 1977, the Respondent was duly admitted to the practice of law in the State of Nebraska by the Nebraska Supreme Court.
2. The Respondent is County Attorney for Custer County, Nebraska, and was County Attorney for Custer County during the periods and the conduct complained in the charges filed by the Counsel of Discipline.
3. Daniel T. Speer is a resident of Broken Bow, Nebraska and is 25 years of age.
4. Sometime commencing on or about October, 1985, the Respondent began an association or relationship with Daniel Speer, which association or relationship was evidenced initially by anonymous gifts from the Respondent to Daniel Speer. The various anonymous gifts, cards and contacts were made by delivery or leaving of such gifts and communications with Daniel Speer's automobile. The contacts by way of gifts and anonymous cards continued for a period of

time, and eventually the Respondent introduced himself to Daniel Speer as the benefactor and person leaving the gifts, money and cards in Mr. Speer's automobile.

5. On July 3, 1986, the Respondent filed a complaint in the County Court of Custer County, Nebraska, Docket 38, Page 684, charging Daniel Speer with the misdemeanor offense of Criminal Mischief.
6. During the pendency of the above-mentioned criminal case, the Respondent offered to personally pay all of Daniel Speer's college expenses.
7. On July 24, 1986, Daniel Speer and the Respondent requested a continuance of the case filed against Speer at Docket 38, Page 684, in the County Court of Custer County.
8. The Respondent is a close personal friend of Carl Speer, brother of Daniel Speer, and contributed \$4,700.00 to Carl Speer's political campaign for Custer County Sheriff.
9. On or about July 26, 1986, the Respondent, Mr. and Mrs. Carl Speer and Daniel Speer attended a concert in Omaha, Nebraska. All of Daniel Speer's meal, lodging, ticket and travel expenses associated with said concert were paid by the Respondent.
10. On or about July 27, 1986, the Respondent asked Daniel Speer if he would attend the World's Fair in Vancouver, B.C., Canada with him. The Respondent offered to pay all of Speer's expenses associated with said trip.
11. On or about August 22, 1986, the Respondent discussed with Daniel Speer a potential criminal prosecution against Speer for Sexual Assault involving Bobbie Jo Amos.

12. On August 28, 1986, Daniel Speer and the Respondent requested a continuance of the case filed against Speer at Docket 38, Page 684, in the County Court of Custer County.
13. On September 17th and 18th, 1986, Daniel Speer and the Respondent traveled from Broken Bow, Nebraska, to Lincoln, Nebraska, and spent time together dining, attending movies, shopping and touring points of interest. All expenses for said trip, including gifts for Speer, hotel accommodations and travel were paid by the Respondent.
14. On September 23, 1986, Daniel Speer appeared in the County Court of Custer County, Nebraska, and was arraigned for the offense of Criminal Mischief, Docket 38, Page 684. The Respondent appeared as the Custer County Attorney at said hearing and represented the interests of the State of Nebraska. Speer entered a plea of not guilty to said charge and trial was scheduled for October 20, 1986.
15. On September 24, 1986, the Respondent dismissed the above-mentioned Criminal Mischief charge and filed a pleading indicating that the charge was being dismissed due to the inadmissibility of the defendant's confession.
16. On or about September 24, 1986, the Respondent and Daniel Speer left Broken Bow, Nebraska, together for a trip to Vancouver, B.C., Canada. The Respondent paid all expenses associated with said trip.
17. On or about September 24, 1986, the Respondent gave Daniel Speer a letter or document indicating that the Respondent had dismissed the Criminal Mischief charge which

had been filed in the County Court of Custer County.

18. On or about September 29, 1986, while on the return trip from Vancouver, the Respondent discussed with Daniel Speer his (Speer's) alleged sexual relationship with Bobbie Jo. Amos, a child under the age of 16.
19. On November 26, 1986, the Respondent filed a felony charge of Burglary against Daniel Speer in the County Court of Custer County, Nebraska. Said charge was based upon the same factual situation which gave rise to the Criminal Mischief Charge filed in the same Court at Docket 38, Page 684.
20. Sometime after return of the Respondent and Daniel Speer from their trip to the World's Fair, Daniel Speer made allegations against the Respondent claiming that there had been a homosexual advance by Respondent towards Daniel Speer. The Respondent has adamantly denied making such an advance.
21. The relationship or association between Daniel Speer and Respondent terminated some time after their return from the trip to Vancouver in September, 1986. The Respondent states in his testimony and evidence that the relationship terminated as a result of an investigation of Daniel Speer and subsequent charges filed by the Respondent. Daniel Speer contends the association or relationship terminated as a result of the alleged homosexual advance occurring in Vancouver during the trip to the World's Fair.
22. On January 12, 1987, the Respondent filed the felony offenses of Kidnapping and False Imprisonment against Daniel Speer in the

County Court of Custer County, Nebraska, in regard to an incident which allegedly occurred on or about February 28, 1986.

23. Daniel Speer was arrested in regard to the above-mentioned Charges on January 12, 1987, and appeared at a hearing in regard to the same on January 13, 1987. The Respondent appeared at said hearing as the Custer County Attorney and represented the interests of the State of Nebraska.
24. On January 13, 1987, the Respondent dismissed the Burglary Charge which was filed against Daniel Speer on November 26, 1986.
25. The Respondent subsequently attempted to negotiate a conditional dismissal of the Kidnapping and False Imprisonment Charged, by requesting Carl Speer to contact Daniel Speer.
26. Bradley P. Roth is an attorney practicing law in Broken Bow, Nebraska. Prior to January 26, 1987, Roth was a personal friend of the Respondent.
27. On or about January 25, 1987, the Respondent informed Bradley Roth that Daniel Speer had threatened him and that he intended to withdraw from the Speer criminal cases and seek Roth's appointment as Special Acting County Attorney.
28. On January 26, 1987, Bradley Roth was appointed as Special Acting County Attorney to prosecute the Daniel Speer criminal cases.
29. Bradley Roth dismissed the Kidnapping charge against Daniel Speer and on May 21, 1987, reduced the remaining charge to the misdemeanor offense of Assault in the Third

Degree to which Speer entered a plea of guilty.

30. On September 16, 1987, the Respondent, appearing as Custer County Attorney, and Bradley Roth, appearing as counsel for a criminal defendant, took the deposition of a potential witness. The Respondent displayed a bayonet-type knife of approximately 12 inches in length before himself on the counsel table at said deposition even though said knife was not relevant to the deposition.
31. During the above-mentioned deposition the Respondent cleaned his fingernails with the bayonet-type knife. The Respondent made comments to the Court Reporter, David C. Francis, indicating that the knife was "for" Attorney Bradley Roth.
32. Subsequent to the appointment of a Special Prosecutor for the pending criminal investigations and charges against Daniel Speer, the Respondent obtained a Court order on September 3, 1987, from the District Court of Custer County, Nebraska, for the purpose of taking the deposition of Daniel Speer in another criminal matter, *State v. Rush*, to inquire of Daniel Speer concerning any statements made by the Defendant, Rush, to Daniel Speer while they were together in custody. The order of the District Court for Custer County provided the Respondent with the right to take the deposition of Daniel Speer and required Daniel Speer, by order of the Court, to appear and be deposed.
33. The deposition of Daniel Speer was taken on September 16, 1987, in the District Courtroom for Custer County, and present were the deponent, Daniel Speer, the Defendant,

Rush, and his attorney, Gary Washburn. The Respondent appeared dressed in a police uniform, a badge, holster and loaded pistol. The Respondent took his position at the Judge's chair. Daniel Speer was deposed from the witness chair. The questions propounded by Respondent to Daniel Speer in the deposition of Daniel Speer taken September 16, 1987 consisted primarily of an inquiry by Respondent of Daniel Speer concerning their personal relationship and association. The questions as transcribed by the Court Reporter in Exhibit 15 continued through 46 pages without any relevance to the prosecution of Larry Rush.

34. Daniel Speer appeared at his deposition without counsel and was interrogated by the Respondent in detail regarding their personal relationship.
35. On September 18, 1987, the Respondent verbally abused and made aggressive physical movements towards Bradley Roth in the District Courtroom of the Custer County Courthouse.
36. On November 17, 1987, the Respondent, appearing as Custer County Attorney, and Bradley Roth, appearing as counsel for a criminal defendant, took the deposition of Mark Haynes. During said deposition, which consists of 92 pages of testimony, the Respondent objected 178 times. Five of these objections were later found by the District Court of Custer County, Nebraska, to have merit.
37. For Christmas, 1987, the Respondent gave Daniel Speer a leather jacket, jeans, \$50.00 in cash, a calendar, dress shirts, a VHS movie,

cologne, a picture, concert tickets and subscriptions to seven magazines. Speer estimates the costs of these gifts to be \$653.00.

38. On April 14, 1988, the Respondent sent a birthday card and \$50.00 to Daniel Speer.
39. The evidence, Respondent's answer and admissions establish that the Respondent did continue to assist the prosecution of Daniel Speer after disqualifying himself because of personal interest.

WHEREFORE the hearing panel of the Committee on Inquiry finds as follows:

1. The actions and conduct of the Respondent as hereinbefore found, constitute violations of his oath of office and the following provisions of the Code of Professional Responsibility, to-wit:

DR 1-102 Misconduct.

(A) A lawyer shall not:

1. Violate a disciplinary rule.
5. Engage in conduct that is prejudicial to the administration of justice.
6. Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

- (A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment of behalf of his client will be

or reasonably may be affected by his own financial, business, property, or personal interest.

DR 5-105 Refusing to Accept or Continue Employment if the Interest of Another Client May Impair the Independent Professional Judgment of the Lawyer.

- (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of his client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interest, except to the extent permitted under DR 5-105 (C).

DR 2-110

- (B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment if:

- (2) He knows or it is obvious that his continued employment will result in violation of a disciplinary rule.
- (3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.

DR 7-102 Representing a Client Within the Bounds of the law.

- (A) In his representation of a client, a lawyer shall not:
- (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

Respectfully submitted.

PANEL OF THE COMMITTEE ON
INQUIRY FOR THE SIXTH
JUDICIAL DISTRICT

/s/ Jack H. Myers
JACK H. MYERS, Chairman

/s/ Howard P. Olsen, Jr.
HOWARD P. OLSEN, JR.

/s/ Dennis D. King
DENNIS D. KING

STATE OF NEBRASKA)
COUNTY OF KIMBALL) ss.
)

Jack H. Myers, being first duly sworn, does hereby state that he as Chairman of the Sixth Judicial District Committee on Inquiry, for the Nebraska State Bar Association, participated as Chairman of the three-member panel which conducted the hearing on the above entitled matter, that he has read and signed the Formal Charges as

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filed by the Committee, and that he hereby verifies that said Formal Charges are true and correct.

/s/ Jack H. Myers
JACK H. MYERS, Chairman
Sixth Judicial District
Committee on Inquiry

Subscribed and sworn to
before me this 19th day of
July, 1988.

/s/ Cherilyn Freuden
Notary Public

GENERAL NOTARY-State of Nebraska
CHERILYN FREUDEN
My Comm. Exp. Sept. 30, 1989

IN THE SUPREME COURT OF THE
STATE OF NEBRASKA

STATE ex rel NEBRASKA)	
STATE BAR ASSOCIATION,)	
Relator,	)	ANSWER TO
	)	FORMAL
vs.	)	CHARGES
GEORGE G. RHODES,	)	Case No. 89-142
Respondent.)	

COMES NOW the respondent, George G. Rhodes, and for his answer to the formal charges, admits that he was admitted to the practice of law in the State of Nebraska by the Nebraska Supreme Court on April 8, 1977. Respondent also admits that he is the County Attorney of Custer County, Nebraska and that Daniel T. Speer is a resident of Broken Bow, Nebraska, who is 25 years of age.

Respondent, hereinafter referred to as County Attorney, enters a general denial with respect to all of the other allegations of the formal charges which are not hereinbefore admitted and for further answer to the formal charges, alleges as follows:

1. With regard to DR 5-101, the County Attorney did not have any personal interest with regard to court cases wherein Daniel T. Speer was a defendant, as the County Attorney was not the victim of the crimes alleged in said court cases. With regard to county attorneys, personal interest is defined by law as being the actual victim of the crime being prosecuted, *State vs. Boyce*, 194 Neb. 538, 233 N.W. 2nd 912 (1975) [facts for said case

stated in *State vs. Saltzman*, 194 Neb. 525, 233 N.W. 2d 914 (1975)].

2. The office of county attorney is a statutory office and the grounds for disqualification of said statutory officer are listed in Section 23-1206 R.R.S. Neb. 1943. The formal charges do *not* allege the existence of any of said statutory grounds regarding disqualification. DR 5-105 which prohibits representation of a client whose interests conflict with *another client*, was *not* violated as the County Attorney had only one client, the government.

3. The County Attorney has an obligation to perform his duties of office and did perform said duties in accordance with his oath of office. The filing of charges, agreeing to continuances, and dismissal of charges are routine functions and activities of the office of county attorney. The cases wherein Daniel T. Speer was a defendant were dealt with in accordance with law. The County Attorney is authorized by law to interview suspects in criminal matters, *State vs. Reeves*, 216 Neb. 206, 244 N.W. 2d 433 (1984).

4. In December, 1986, the County Attorney received a written victim's statement indicating that after being "flipped off" by a child, Daniel T. Speer retaliated by attacking with a nightstick and abducting a different child who had merely witnessed the incident. Deputy Sheriff Dennis Fox conducted an investigation, obtained statements from three witnesses and submitted a written report.

5. Upon receipt of said statements and reports, the County Attorney presented the affidavit of the investigating officer, Dennis Fox, to the County Judge on January

12, 1987. The County Judge found from the evidence that a warrant should be issued for the arrest of Daniel T. Speer for Kidnapping and First Degree False Imprisonment.

6. Following his arrest for attacking and abducting a child, Daniel T. Speer threatened to assault the County Attorney. Daniel T. Speer has a history of threats of violence and assaults, having previously received psychiatric care for violence. Due to the threat of assault, the County Attorney then had the legal discretion to either withdraw or continue prosecuting Speer for the attack and abduction of the child, *State vs. Boyce, supra*. The County Attorney filed a motion requesting that a special acting county attorney be appointed.

7. On January 26, 1987, Hon. Ronald D. Olberding, District Judge, appointed Brad Roth special acting county attorney. Mr. Roth's firm was the only local law firm available for the appointment as the other local firms, which were handling felony cases at that time, had consulted with either Daniel T. Speer or the victim of abduction. Daniel T. Speer continued his attack upon the County Attorney, engaging in both character assassination and death threats combined with felonious acquisition of firearms and ammunition.

8. Daniel T. Speer's modus operandi when apprehended for criminal conduct is to indulge in uttering false statements. When investigated for a burglary, Daniel T. Speer made false statements to the investigating police officer on three separate occasions. When apprehended for hunting without a license, Daniel T. Speer, who had graduated from high school and spent three years on

active duty in the United States Army, then attempted to avoid prosecution by trying to convince the investigating officer that he [Speer] was too young to need a hunting license. In the course of said attempted deception, Daniel T. Speer gave the investigating officer a date of birth which falsely alleged that Speer, an army veteran, was only 16 years of age.

9. After his arrest for kidnapping and false imprisonment, Daniel T. Speer attempted to defraud the Custer County Court into providing legal counsel at the taxpayers' expense, by making false statements as to the amount of his income and falsely concealing about one-half of his income.

10. On April 21, 1987, Daniel T. Speer presented to the Nebraska Attorney General's office, the scurrilous allegation which Speer is alleged to have made in the formal charges. Upon an investigation of Speer's malicious accusation against the County Attorney, the Nebraska Attorney General's office found nothing which warranted taking any legal action against the County Attorney, with respect to said malicious, scurrilous and false allegation.

11. In addition to malicious character assassination, after threatening the County Attorney's life, on February 27, 1987, Daniel T. Speer feloniously uttered a false written statement in violation of 28 (sic) USCA §922(a) (6) in order to purchase a handgun. Speer subsequently altered the document containing his false written statement in an effort to conceal his crime. He then feloniously took possession of a handgun and ammunition in violation of 28 (sic) USCA 922(n) and left the store. After Speer's

departure, the store clerk discovered Speer's felonious false statement. The clerk telephoned the police who obtained the return of the feloniously obtained handgun and ammunition to the store.

12. Daniel T. Speer then feloniously threatened to slit the County Attorney's throat. Following that threat, Daniel T. Speer feloniously obtained another firearm and threatened to place a gun barrel under the County Attorney's chin and pull the trigger. Following this terroristic threat, Daniel T. Speer was apprehended on April 17, 1987, feloniously purchasing 600 rounds of ammunition in violation of 28 (sic) USCA §922(n).

13. On or about August 12, 1987, Daniel T. Speer pointed at the County Attorney and stated: "I'm going to kill you!" Shortly after that felonious terroristic threat, there was siezed (sic) from Daniel T. Speer's bedroom, a live rattlesnake which he had intended to place in the County Attorney's automobile.

14. Although not involved in criminal conduct with Larry Rush, Daniel T. Speer was a material witness in the cases of *State vs. Larry Rush*, District Court of Custer County, Case Numbers 253 and 258. The witness, Daniel T. Speer's deposition was taken on September 16, 1987. At the deposition, the County Attorney attempted to dissuade Speer from his intentions to murder the County Attorney and obtained from the witness Daniel T. Speer's testimony revealing incriminating admissions made by the defendant, Larry Rush.

15. In January, 1987, the County Attorney extended an initial plea bargain offer of dismissing the felony charges against Daniel T. Speer involving the abduction

arrow to his bow in the form of 43-202 (4)(b), . . . *Id.* 216 Neb. at 931.

In *State vs. Willis*, 223 Neb. 844, 394 N.W.2d 648 (1986), Mr. Rhodes was the first county attorney in the State to prosecute under the Nebraska sexual assault statutes, a husband for forcibly sexually assaulting his wife. The district court held that under the common law, a husband could not be convicted of raping his wife. In an opinion by Chief Justice Hastings, the Nebraska Supreme Court reversed, holding that the new sexual assault statutes abrogated any common law spousal exclusion.

On two occasions, when Mr. Rhodes undertook innovative legal actions, they were upheld and legal precedents made which established an extension of the laws protection of the rights of women and children. On a third occasion, Mr. Rhodes, acting under color of state statutes which provide that he is a bona fide peace officer, wore his own uniform. He was suspended from the practice of law. Such disciplinary action can be extremely chilling to innovations in the law.

There is a constitutional requirement that each state have a republican form of government, United States Constitution, Article IV, Section 4. In compliance with this federal constitutional requirement, the Nebraska Constitution contains a separation of powers provision, Constitution of the State of Nebraska, Article II, Section 1. In *Michael Bowers, Attorney General vs. The State Bar of Georgia*, *supra*, the separation of powers issue arose.

The State Bar urges that it has jurisdiction to discipline the Attorney General who must be a

member in good standing of the Bar as an ongoing qualification to holding his elective office. . . . The Bar correctly notes that there is nothing in the Rules to exempt the Attorney General from their application. Yet, suspension or disbarment of the Attorney General by the State Bar would result in a vacancy of the office tantamount to impeachment or removal. This raises grave concerns as to the proper separation of powers under Ga. Const. Art. 1 Sec. 2. Par. 3 *Id.* p. 7.

The Court held that it was a violation of the separation of powers doctrine, to prosecute disciplinary actions based upon conduct done under color of state statute by an elected member of the executive branch.

. . . It is this Court's opinion that to accord the State Bar removal power over elected officials, concurrent with the executive, is an impermissible intrusion by the judiciary on the authority of the executive. To permit the Bar to suspend or disbar the Attorney General prior to any regulatory action by the proper executive authority would be in derogation of the franchise. *Id.* p. 6-7.

Pursuant to the federal constitutional requirement that states have a republican form of government, the Nebraska Constitution provides that the county officers are to be chosen by election.

The Legislature shall provide by law for the *election* of such county and township officers as may be necessary . . . Constitution of the State of Nebraska, Article IX, Section 4.

In *Simpson v. Alabama State Bar*, 311 So.2d 307 (1975) the Alabama Supreme Court held that the district attorney was immune from disciplinary action. The Pennsylvania Supreme Court has held that disciplinary sanctions are not proper where they would prevent an elected prosecutor from carrying out the duties of his office, In *Snyder's Case*, 152 A. 33 (Penn. Supreme Court 1930).

. . . Where the Constitution or statute points out a method for the removal of a public officer, that is exclusive of other methods. . . . While a district attorney retains his office, he should not be deprived of the right to appear in court as such and represent the commonwealth, even if temporarily suspended for misconduct. In re Maestretti, 93 P. 1004. *Snyder's Case*, *Id.* (Emphasis supplied).

The Nebraska statutes provide for means of removal of elected county officers, such as recall. In its decision, the Pennsylvania Supreme Court, imposed a suspension, but provided an exception to the suspension, so that the Respondent could carry out his official duties.

In No. 34, January term, 1931, being the appeal of Charles A. Snyder from the order making absolute the rule for his disbarment, the order is modified and in place of being disbarred, the respondent is suspended from practice in the several courts of Schuylkill county for the period of one year, beginning at the date of the filing of this order, saving to him the right to appear as district attorney and represent the commonwealth whenever his duty so requires. The costs to be paid by Schuylkill county. *Id.* at 37.

The hallmark of a democracy is that the officers of government are chosen by the election. The voters should

be entrusted with making the decision as to who shall hold an elective public office.

Pages 25-28 of BRIEF IN SUPPORT OF MOTION FOR REHEARING filed by Petitioner with the trial court.

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TRIAL EXHIBIT 45

Committee on Inquiry
6th District

Re: George Rhodes Attorney at Law

Being on the board of supervisors for 8 years I have found George Rhodes to be a very prompt & understanding attorney. We have had no problems of his finding a solution to our problems.

Sincerely

/s/ Robert Scott
Chairman of the Custer
County
Board of Supervisors.

14 DECEMBER 1988

NEBRASKA STATE BAR ASSN

COMMITTEE ON INQUIRY
DISTRICT SIX

DEAR SIRS:

I have served on the Custer County Board of Supervisors for almost 2 years and privileged to work with George Rhodes on a weekly basis during that time.

George Rhodes has always been and is ready and eager to assist the County Board on any request or duty we have asked him to perform.

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I think George Rhodes is a courteous and capable County Attorney and I look forward to working with him in the future.

Sincerely,

/s/ Herbert Bontemeyer
Herbert Bontemeyer
1244 North G
Broken Bow, Nebr. 68822

December 21, 1988

To whom it may concern:

I would like to take this opportunity to acknowledge, that George Rhodes, County Attorney of Custer County is, and has been since I have know him, honest, hard working, intelligent and very conscientious. I have never known him to be anything other than a prudent, upright man and a credit to his profession.

Sincerely,

/s/ Robert R. Weatherly
Robert L. Weatherly
Custer County Supervisor-
Dist. 6

OFFICES OF

RUFF, FLOROM & NISLEY

RONALD A. RUFF

KENT E. FLOROM

JAMES R. NISLEY

ROBERT P. LINDEMEIER, ASSOC.

1020 SOUTH DEWEY

P.O. Box 906

NORTH PLATTE, NE 69103-0906

(308) 534-6740

February 17, 1989

Mr. William Connolly

Attorney at Law

P.O. Box 315

Hastings, NE 68901

Dear Mr. Connolly:

Our firm entered into a contract for Public Defender services with Custer County, Nebraska, on January 1, 1989. Prior to that time and since, I have had the privilege and pleasure to work with Custer County Attorney, George Rhodes. I have found Mr. Rhodes to be a very personable fellow who is very knowledgeable about his job.

In this past week it came to my attention that there are apparently some charges of ethics violations pending against Mr. Rhodes. I was told that some of the charges have to do with his mental capacity and competency. Upon hearing this, I asked Mr. Rhodes if there was anything I could do to help him. He suggested that I write a letter to you. Mr. Rhodes did not in any way solicit this letter.

I have been a practicing attorney since 1967. From 1968 to 1972, I was a prosecuting attorney in Delaware County, Indiana. From 1973 to 1977, I was a County Judge in the 13th Judicial District. Since 1977, I have practiced law in North Platte, Nebraska. Based upon my years of practice

and service I can unequivocally state that George Rhodes appears to be a fit, competent, and extremely capable County Attorney. There is no doubt in my mind that he is knowledgeable of the law and procedure. He also appears to have compassion and understanding. These are unique qualities in a County Attorney.

In summary, I hope this letter can be of some benefit to Mr. Rhodes. I am at a complete loss to explain how he could be facing allegations of mental incompetency. He appears to be a genuine asset to the residents and taxpayers of Custer County. I am making this assessment based upon all of the prosecutors I have associated with in the past 22 years.

Very truly yours,

/s/ Ronald A. Ruff
Ronald A. Ruff

W.G. ARNOLD, D.D.S.
311 South 10th Street
Broken Bow, Nebraska

December 22, 1988

To Whom It May Concern:

I have been acquainted with George Rhodes for several years and in 1985, I sponsored [sic] him for membership in Rotary International. George is a good member, fulfilling his duties and obligations to the organization in an exemplary manner.

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I know him to be honorable, hardworking, compassionate and a credit to the office of County Attorney. I consider him to be a fine example, both personally and professionally, of what a good County Attorney should be.

Sincerely yours,

/s/ W G Arnold DDS
W. G. Arnold, D.D.S.

GRAYSTON COOL
Rt. 1, Box 105
Callaway, Nebraska 68825
December 16, 1988

Nebraska State Bar Association
Committee of Inquiry
Sixth District

Re: George Rhodes, Custer County Attorney Broken
Bow, Nebraska

Dear Sir,

As a member of the Board of Supervisors of Custer County for 12 years, I have had occasion to become well acquainted with George Rhodes.

I have found George to be very dedicated to the profession and a hard worker. George is of good character and reputation. On occasion the Board would present him with a question or what direction to take and he would give his opinion and explain why, then return to his office and return with a copy of the statute on what he had based his opinion.

I cannot feature George putting himself in a position to place himself in jeopardy of the profession.

I have found George to put in long hours at his work.

George has also followed a pattern of furthering his education in the profession.

During my terms as Custer County Supervisor (chairman 5 years) we have had numerous County Attorneys and George has been most satisfactory.

If more information is needed, please advise.

Yours truly,

/s/ Grayston Cool
Grayston Cool

Home of the Warriors and Warriorettes

ANSLEY PUBLIC SCHOOLS

* Telephone 308-935-1121

FLOYD RUHL, Superintendent Ansley, Nebraska 68814
WILLIAM HORST, Principal

Disciplinary Review Board
Nebraska State Bar Association

RE: George Rhodes - Custer County Attorney

Members of the Disciplinary Review Board:

Mr. George Rhodes has been the attorney-coach for the mock trial team at Ansley High School for the past five

years. He, along with Mr. Greg Anderson, initiated the program in our school system, in the fall of 1984. It has been my privilege to have assisted Mr. Rhodes as the teacher-coach, throughout these five years; during which time, I have observed countless positive attributes regarding his character and work ethics.

His amicable personality, and positive, encouraging attitude, are assets in dealing with youth today. The students respond well to his genuine concern to assist them. He is a gentleman of integrity, who exhibits and practices high moral values; his life being one of sincere, Christian commitment. As a result, he is an exemplary role model for our teens.

Throughout the years, the interest of Ansley students in mock trial competition has increased markedly. A total of thirty-seven students have participated, since its inception. All have attested to a wholesome experience. Many graduates return from advanced studies, to note that the competition strengthened their preparation for college. One young lady, a UNL student, returns each summer to Mr. Rhodes' office to work. She intends to pursue a career in Law. We attribute the students' positive experiences, and the success of the Ansley program, to Mr. Rhodes' selfless, dedicated efforts. He has contributed many volunteer hours.

In addition to inspiring/motivating, a substantial segment of the youth in this community, he has impressed the parents of those youth, and local citizens, as well as taxpayers, who have benefited from his service as an efficient public official. He is regarded with highest respect in Ansley, and the outlying communities, because

his conduct and job performance have never been less than professional.

Thank-you for review these statements.

Sincerely,

/s/ Roberta Snyder
Mrs. Roberta Snyder
teacher

REGISTER OF DEEDS

Custer County

Broken Bow, Nebraska 68822

08-872-2221

Deputy Amy Oxford

[Picture Omitted In Printing]

December 15, 1988

Nebraska State Bar Association
Disciplinary Review Board

Dear Sirs.

I am the Register Of Deeds for Custer County and have been for the past 18 years and since George Rhodes has been County Attorney he has been most cooperative with me in any problems that have arisen in the office. Helping with statutes that deal with the office and sound advice on recording problems that have come up.

I feel that George Rhodes is a very dedicated County Attorney and puts in a lot more time than the rest of the Elected County Officials. His work load is very heavy and he works accordingly.

I feel that George Rhodes is a very capable, competent County Attorney, and in the intrest [sic] of the Public that he serves he should be allowed to continue in that practice, and as an attorney anywhere in the State of Nebraska.

If I can be of any more help with this matter please feel free to contact me.

Respectfully

/s/ Donald L. Ellingson
Donald L. Ellingson
Register Of Deeds
Court House
Broken Bow Ne. 68822

Lea Dell Jones
CUSTER COUNTY TREASURER
Phone 308/872-2921
P.O. Box 444
Broken Bow, Nebraska 68822

December 15, 1988

Disciplinary Review Board
Nebraska State Bar Association

Sirs,

In regard to the inquiry being made on George Rhodes, Custer County Attorney:

I have been County Treasurer for 14 years and I can say without hesitation that George Rhodes has always been more than helpful when I have asked for his help and

advice concerning problems of my office. He never hesitates to search the Statutes to back up a legal question and he tries to be fair with everyone.

Basing my opinion on County Attorneys we have had in the past, I think George Rhodes is an excellent County Attorney.

Yours truly,

/s/ Lea Dell Jones
Lea Dell Jones
- Custer County Treasurer

Office of
CUSTER COUNTY SURVEYOR
Eugene R. Schiltz
Broken Bow, Nebraska 68822
Phone 872-6925

December 15, 1988

DISCIPLINARY REVIEW BOARD

Dear Members,

This letter is in regards to my personal belief and knowledge of Mr. George Rhodes, Custer County Attorney, Broken Bow, Ne.

I have been the appointed, and am now the elected, Custer County Surveyor. As the Custer County Surveyor, I must seek the counsel and advice of the County Attorney concerning County roads. When I seek Mr. Rhodes

of the child, in return for Speer's plea of guilty to a misdemeanor with a recommendation of probation and mental counseling. The County Attorney subsequently withdrew from the case on his own motion when Speer began threatening him and on January 27, 1987, an attorney for Speer offered (sic) as a plea bargain to have his client, Daniel T. Speer, plead guilty to a misdemeanor, regarding the abduction case.

16. Special Acting County Attorney Brad Roth refused the plea bargain offer. On January 30, 1987, Mr. Roth filed against Daniel T. Speer, an Information in the District Court of Custer County, Nebraska, Criminal Docket 5, Case 252, which contained both felony and misdemeanor charges in connection with the incident involving Speer's abduction of the child. On May 21, 1987, Brad Roth dismissed the original Information which Mr. Roth had filed in Case 252, in return for Daniel T. Speer's (sic) plea of guilty to an Amended Information containing a misdemeanor charge of assault with a recommendation of probation with mental counseling. The District Court approved the plea bargain and subsequently imposed a sentence in accordance with the plea bargain which was the same plea bargain offer which the County Attorney had initially made prior to his withdrawal.

17. On February 18, 1987, Daniel T. Speer was arrested for First Degree Sexual Assault upon a Child. Brad Roth filed an Information against Daniel T. Speer in the District Court of Custer County, Nebraska, Case 255, charging Speer with First Degree Sexual Assault upon a Child.

18. The County Attorney's independent professional judgment with respect to court cases involving Daniel T. Speer remained unaffected even after his withdrawal and Speer's ensuing character assassination efforts and felony terroristic death threats directed against the County Attorney. On May 11, 1987, in the presence of two individuals, the County Attorney privately stated his assessment of Case 255, predicting that the State would be unable to obtain a conviction upon the charge of First Degree Sexual Assault upon a Child which Mr. Roth had filed against Daniel T. Speer. On September 11, 1987, a jury returned a verdict of acquittal in Case 255, just as the County Attorney had predicted exactly four months earlier.

19. The County Attorney is ex-officio coroner and is a peace officer, Sections 49-801 (15) and 83-1011 R.R.S. Neb, 1943, and has the powers, prerogatives, and privileges of a peace officer, Sections 29-401, 25-1548, and 25-1223, R.R.S. Neb. 1943. Upon withdrawal from a case, a county attorney remains an officer of the State and is specifically authorized by law to provide assistance and information to the special acting county attorney, *State vs. Newman*, 179 Neb. 7465, 140 N.W. 2d 406 (1966). The County Attorney's withdrawal due to Daniel T. Speer's threats was not mandatory but merely discretionary, *State vs. Boyce, supra*. After the County Attorney's withdrawal on his own motion on January 26, 1987, the decisions regarding court cases wherein Daniel T. Speer was a defendant and court appearances for the State were all made by special acting county attorneys.

20. In April, 1987, special acting county attorney Brad Roth accepted employment as defense counsel for

criminal defendants Pete Coleman and Cecil Hunsaker. Mr. Roth then began taking information which he was obtaining in his capacity as attorney for the State and used the information against his client, The State, for the benefit of his clients Pete Coleman and Cecil Hunsaker. When these actions of Mr. Roth came to the attention of the District Court, the Court, on June 11, 1987, on its own motion, terminated Brad Roth from the position of special acting county attorney.

21. Following his termination, Mr. Roth began submitting billings to Custer County for fees far in excess of the Court's guidelines for attorney fees for court-appointed counsel. For the period of July 1, 1987 to January 31, 1989, the total billings to the County by Mr. Roth's firm were more than double those of the other law firms. For the fiscal year July 1, 1987 to June 30, 1988, the amount expended by the District Court for court appointed attorney fees was 309% of the amount contained in the court's budget. As a result, the Custer County Board of Supervisors contracted to hire a public defender who took office January 1, 1989.

22. After the County Attorney, on behalf of the County took exception to some of Mr. Roth's claims, Mr. Roth engaged in derogatory conduct towards the County Attorney.

23. The District Court entered an order requiring reciprocal discovery in *State vs. Hunsaker*, Case Number 256. On September 18, 1987, the County Attorney had a meeting with Mr. Roth for the purpose of exchanging discovery material. The County Attorney informed Mr. Roth of the list of the State's witnesses and requested a

list of Mr. Roth's witnesses. Mr. Roth contumaciously refused to comply with the court order for reciprocal discovery, refusing to supply a witness list or any other discovery material. Mr. Roth's refusal to produce a witness list operated as a total denial of the State's right to take depositions of defense witnesses since Mr. Roth was concealing their identities.

24. Mr. Roth began badgering the County Attorney with demands for additional discovery material while Mr. Roth continued to adamantly (sic) refuse to comply with the court order for reciprocal discovery. Eventually, the County Attorney brought the meeting to a conclusion by walking out of the room. On October 1, 1987, the District Court ordered Mr. Roth's firm to comply with the order of reciprocal discovery and specifically ordered the firm to produce the witness list.

25. Upon receipt of the witness list, it appeared that Mr. Roth's client, Cecil Hunsaker, was planning a civil rights suit against the government. One of the persons on the list had a \$400,000.00 civil rights suit pending against the City and another had threatened to sue. These individuals listed by Mr. Roth were not eye witnesses to the events involving Mr. Hunsaker. At the depositions, Mr. Roth badgered one of the State's witnesses to the point that for a period of time she refused to speak to him. The trial court's ruling that six of the County Attorney's objections at the Mark Haynes deposition had merit is void due to the trial court having conducted an independent investigation regarding the matter prior to rendering its decision.

26. With respect to the deposition of officer Mark Haynes on November 17, 1987, the parties stipulated, "That all objections be made at the time of the deposition." Accordingly, the County Attorney diligently represented his client's interests with respect to both the criminal case and potential civil rights action by preserving in the record, exceptions to a number of questions which Mr. Roth propounded. In most instances, when an objection was made, the question was simply answered subject to the objection. Mr. Roth propounded over 300 questions to which there were only 22 objections which were certified for ruling upon by the trial court.

27. With the exception of Sennett & Roth, to whose fees the County Attorney had objection on behalf of the County, after the filing of the Complaint in this case, all of the attorneys in Custer County submitted testimony or letters on behalf of the County Attorney, attesting to his good character and professional conduct. The County Judge, Hon. Robert E. Wheeler, testified that the County Attorney's reputation for truthfulness and honesty is impeccable, also testifying that the County Attorney is always courteous in the courtroom and extremely well prepared in presenting his client's case.

* * *

29. In addition to evidence that Daniel T. Speer has been habitually making false statement for the past seven years, the testimony of the County Attorney, a number of character witnesses, circumstantial evidence and documentary evidence show the falsehood of Daniel T. Speer's

scurrilous allegation. Daniel T. Speer's scurrilous allegation is also conclusively shown to be false by a tape recorded conversation of Daniel T. Speer.

30. At the hearing the Committee on Inquiry, a committee member requested that an expert examination be made of the tape recording and that the hearing be held open pending the receipt of the report of the expert emanation (sic). The expert examination commissioned by the Committee on Inquiry was conducted and a report issued on June 2, 1988 verified the authenticity of the exonerating tape recording. However, the Committee did not hold its hearing open pending the examination and as a result, the Committee did not receive into evidence the exculpatory report which resulted from the expert examination which the Committee had commissioned. Instead, the Committee on Inquiry terminated its hearing on May 27, 1988 with a final adjournment by adjourning "sine die" [454:6-7].

31. The time within which a Committee on Inquiry may execute verified formal charges and transmit them to the Disciplinary Review Board is limited by Supreme Court Rule (H) (3) (h) to forty-five days following the termination of the committee hearing. The hearing panel of the Committee on Inquiry did not transmit to the Disciplinary Review Board any formal charges within the forty-five days provided by law. The last page of the formal charges reflects on its face that they are executed by the chairman on July 19, 1988, which is eight days after the time for submitting formal charges had expired, as the hearing was adjourned "sine die" [454:6-7] on May 27, 1988. There is a lack of jurisdiction due to the failure to submit any formal charges within the time provided by

law, with Supreme Court Rule 9 (H) (3) (h) having been violated.

WHEREFORE, Respondent respectfully prays that the untimely formal charges be dismissed.

/s/ William M. Connolly
William M. Connolly #10761
CONWAY, CONNOLLY and
PAULEY, P.C.
P.O. Box 315
Hastings, NE 68902 - 0315
Tel. No. (402) 462-5187
Attorney for George Rhodes

IN THE SUPREME COURT OF THE
STATE OF NEBRASKA

State of Nebraska, ex rel)	
Nebraska State Bar Association,	)	Case No. 89-142
)	
Complainant,	)	PREHEARING
vs.	)	CONFERENCE
	)	ORDER
George G. Rhodes,)	
)	
Respondent.)	

NOW on this 30th day of May, 1989, this matter came on for a prehearing conference before Leonard P. Vyhnaelek, the court appointed referee. The Counsel for Discipline, Dennis G. Carlson, is present. The Respondent is represented by his attorney, William M. Connolly, who is present.

The referee finds as follows:

1. That the issues have been simplified by agreement of the parties to the effect that the Nebraska State Bar Association will not pursue allegations numbers 36 and 39 at the time of the hearing.

2. The pleadings are complete and no further amendment to the pleadings would be allowed except upon application and good cause shown.

* * *

BY THE REFEREE

/s/ Leonard P. Vyhnaelek
Leonard P. Vyhnaelek #14346
Attorney at Law
P. O. Box 1205
North Platte, NE 69103-1205
Telephone: (308) 534-4584

TEXT OF RECORD REFLECTING PETITIONER'S
STATUS AS EX OFFICIO CORONER AND PEACE
OFFICE WITH THE FULL POWERS AND
PREROGATIVES OF PEACE OFFICER

In 1915, the Legislature granted County Attorneys the additional office of coroner. *State ex rel Crosby vs. Moorhead*, [159 N.W. 412] 100 Neb. 298 (1916) Section 23-1210 R.R.S. Neb. 1943 (Reissue 1988). Coroners are regular peace officers.

Unless the context is shown to intend otherwise, words and phrases in the statutes of Nebraska hereinafter enacted are used in the following sense:

(15) Peace officer shall include sheriffs, coroners, . . . and all other persons with similar authority to make arrests; Section 49-801 (15) R.R.S. Neb. 1943 (Reissue 1988) (Emphasis supplied)

As a peace officer, . . . [Petitioner] has the same statutory duties and powers as other peace officers, including a statutory duty to arrest law violators on sight.

Every . . . peace officer as defined in subdivision (15) of section 49-801, shall arrest and detain any person found violating any law of this state, or any legal ordinance of any city or incorporated village, until a legal warrant can be obtained . . . Section 29-401 R.R.S. Neb. 1943 (Reissue 1985)

Under the Nebraska statutes, some of the powers vested in the sheriff are also granted to the coroner and exceed those of city police officers, such as handling executions Section 25-1548 R.R.S. Neb. 1943 (Reissue 1985), substituting for the sheriff when the sheriff is disqualified, Section 25-2202 R.R.S. Neb. 1943 (Reissue

1985) and being one of the officers regularly designated for serving subpoenas, Section 25-1223 R.R.S. Neb. 1943 (Reissue 1985). In addition to the regular criminal law enforcement powers and the powers of serving civil process, . . . [Petitioner] also has the powers of civil arrest for civil commitments. For example, Section 83-1020 of the Nebraska Mental Health Commitment Act provides that any peace officer may take a mentally ill dangerous person into emergency protective custody. The Act defines peace officer as:

Peace officer, defined. Peace officer shall mean a sheriff, coroner, jailer, marshal, police officer or member of the Nebraska State Patrol. Section 83-1011 R.R.S. Neb. 1943 (Reissue 1987) (Emphasis supplied).

When a witness disobeys a subpoena or an order to answer a question, it is the sheriff or coroner, who is to arrest the errant witness.

When a witness fails to attend in obedience to a subpoena, except in case of a demand and failure to pay his or her fee, the court or officer before whom his or her attendance is required may issue an attachment to the sheriff or coroner of the county commanding him or her to arrest and bring the person therein named before the court . . . Section 25-1230 R.R.S. Neb. 1943 (1988 Cumulative Supplement) (Emphasis supplied)

Every attachment for the arrest or order of commitment to prison of a witness by a court or officer pursuant to Sections 25-1230 and 25-1231 shall be under the seal of the court . . . Such order of commitment may be directed to the sheriff or coroner . . . Section 25-1232 R.R.S. Neb. 1943 (1988 Cumulative Supplement) (Emphasis supplied)

BRIEF filed by Petitioner with the trial court on
October 17, 1989, pages 38-39

* * *

By law, . . . [Petitioner] is unquestionably a peace officer and the trappings of office naturally inure to the office holder. . . . Wearing his uniform could certainly be considered flamboyant or dramatic. . . . [Petitioner] won't be wearing his uniform in the future (345:17-19). In making numerous decisions, on occasion a government official will make controversial decisions. . . . [Petitioner] respectfully suggests that in an elected form of government, the selection of public officials, based on the decisions which they make in exercising their official powers and prerogatives, is a matter best left to the voters.

Page 40 of BRIEF filed by Petitioner with the trial court on October 17, 1989.

TEXT OF RECORD WHEREIN PETITIONER RAISED
IN STATE COURT, THE FEDERAL QUESTION OF
DEROGATION OF THE FRANCHISE UNDER AR-
TICLE IV, § 4 OF THE UNITED STATES CONSTITU-
TION

. . . In making numerous decisions, on occasion a govern-
ment official will make controversial decisions. . . .
[Petitioner] respectfully suggests that in an elected form
of government, the selection of public officials, based on
the decisions which they make in exercising their official
powers and prerogatives, is a matter best left to the
voters.

Public officials are often subject to criticism and that
is inherent in holding public office. If it were also
grounds for discipline, no member of the bar could beel
[sic] safe in holding public office due to the chilling effect
of potential disciplinary action. In *Michael Bowers, Attor-
ney General of Georgia vs. The State Bar of Georgia*,
(Superior Court of Dekalb Co. Ga. 1987) a hearing panel
had found probable cause that the Attorney General had
violated six standards of the professional code. However,
his actions were done pursuant to statutory powers and
an injunction was granted restraining disciplinary action,
the Court stated:

. . . The fear of disciplinary proceedings stem-
ming from any act done under the color of pub-
lic duty is too great an inhibition on the
vigorous fulfillment of that duty. *Id.*
(E63:469,470, Ex. Vol. I)

In contrast, in *State ex rel NSBA vs. Douglas, supra*, the the
Respondent did not act under color of law, rather the
charges included violations of state law, namely five

counts of violation of the Nebraska Political Accountability and Disclosure Act. . . . [Petitioner] respectfully suggests where disciplinary action will remove an elected official such action should be reserved for cases involving fraud, deceit, dishonesty or violation of law.

Pages 40-41 of BRIEF filed by Petitioner with the trial court (which is a state court of last resort) on October 16, 1989.

. . . A review of the witnesses in this case, reviews that this case is nothing more than . . . a couple of false witnesses seeking to overturn an election and oust the County Attorney . . .

Page 27 of REPLY BRIEF filed by Petitioner with the trial court on November 27, 1989.

IV.

EACH STATE MUST MAINTAIN A REPUBLICAN FORM OF GOVERNMENT WITH AN INDEPENDENT EXECUTIVE BRANCH OF GOVERNMENT CHOSEN BY THE VOTERS.

Constitution of the United States of America Article IV, Section 4.

Michael Bower Attorney General vs. The State Bar of Georgia (E63:469,470 Vol. III Superior Court of Dekalb Co. Ga. 1987)

Simpson v. Alabama State Bar, 311 So. 2d 307 (Supreme Court of Alabama 1975).

Snyder's Case, 152 A. 33 (Supreme Ct. Penn. 1930).

Page 2 of BRIEF IN SUPPORT OF MOTION FOR REHEARING filed with the trial court, which is also a state court of last resort.

In *Michael J. Bowers vs Attorney General of Georgia vs. The State Bar of Georgia*, (E63:469,470 Vol. III, Superior Ct. of Dekalb Co. Ga. 1987) the Court held that disciplinary actions should not be based upon conduct done under color of state law.

. . . The fear of disciplinary proceedings stemming from any act done under the color of public duty is too great an inhibition on the fulfillment of that duty. . . . *Id.*

This is probably the first time that a county attorney exercised the peace officer's prerogative of wearing a law enforcement uniform. However, this is not the first time that in performing his duties as county attorney, Mr. Rhodes engaged in in [sic] a unique exercise of his statutory prerogatives.

In *In Re Interest of K.S.*, 216 Neb. 926, 346 N.W.2d 417 (1984), Mr. Rhodes was one of the first county attorneys in the State to use a juvenile court action under the then existing Section 202 (4) (b) [now 43-247 (3)(b)] to enforce parents compliance with Nebraska's compulsory education laws for children. The parents complained that the unprecedented use of this statutory provision was improper.

In an opinion by Chief Justice Krivosha, the Nebraska Supreme Court held that the child should be adjudicated under that statutory provision and stated:

. . . We cannot fault the county attorney in this case, who carefully read our decision in *Rice* and to avoid the pitfalls of *Rice* added a second

advice as to a County road, he is clear as to the rights of the County and to the taxpayer.

I have been a Registered Land Surveyor for eighteen years and have been appointed as County Surveyor in several other counties, in which I have had to consult with other County Attorneys and Mr. George Rhodes is one the best.

It is my belief that Mr. Rhodes tries to be fair and honest with all people and that he is an asset to Custer County and to the legal profession.

Truly
/s/ Eugene R. Schiltz

December 15, 1988

ATTN: Disciplinary Review Board
RE: Custer County Attorney, George Rhoades [sic]

Having worked with George Rhoades [sic] through the Optimist Club of Broken Bow, Nebraska, on various projects, I have found Mr. Rhoades [sic] to be an extremely willing worker in our youth programs and in our other Optimist Programs within the City of Broken Bow.

I have also worked with Mr. Rhoades [sic] with regard to those situations which arise from time to time between the City, City Attorney and County Attorney. I have always found Mr. Rhoades [sic] willing to listen, to use good judgment and to act in a professional manner.

App. 97

Should you need further information, or explanations,
please feel free to contact me.

Sincerely,

/s/ Robert C. Jacobsen
Robert C. Jacobsen, Mayor
742 North 7th
Broken Bow, NE 68822
(308) 872-5368

Dec. 14, 1988

Dist. Six
Committee on Inquiry
Gentlemen:

I write this letter on behalf of George G. Rhodes, Custer County Attorney. I have known George the last eight years when he became County Attorney. As a County Supervisor I have relied on George's advice and recommendations many times. I have always found George to be very professional, accommodating, prompt and courteous. George is an energetic hard working County Attorney. I doubt very much if George has ever used his position as County Attorney to intimidate anyone.

Sincerely,

/s/ Edwin Scoot
Edwin Scott
Custer County Supervisor

App. 98

December 14, 1988

Disciplinary Review Board
Nebraska State Bar Association

Dear Sirs:

This letter is being written as a character reference for George Rhodes. George is hard working, pleasant to be around, has a sense of humor, accommodating, very knowledgeable of the law, fair and will prosecute law violators. George has lost cases in Court but I have never seen him become angry or with a desire to "get even". George prosecutes the violation, not the person.

In Cases investigated by me George has given valuable insight as to what was needed to make a strong case in Court, the association had benefited the Police as well as the Community Justice is one pillar holding up this Democracy, George is a part of that pillar. The System works very well in Custer County, there is cooperation at every level from the County Attorney to the Court System, but as always new things should be tried. George has ideas that are valuable so Justice prevails in this County. Yes, I have heard complaints from people about George Rhodes as they come to jail for their second or third time around for the same offense as the first or the violation of probation given by the Court. Is it George Rhodes fault laws are violated, people prosecuted that break the laws or difference over sentencing causing appeal by prosecution. Is it wrong for a elected official to want the taxpayer to get their monies worth.

George Rhodes was elected by the people of Custer County, last year George ran unopposed [sic]. I personally feel George Rhodes is doing a good job.

App. 99

Sincerely,

/s/ L.O. Muhlbach
L.O. Muhlbach
Chief of Police
Broken Bow, Ne 68822

LARRY'S ONE HOUR PHOTO
818 see South E
Broken Bow, Nebraska 68822

308-872-6646

December 13, 1988

DISCIPLINARY REVUE BOARD

To whom it may concern:

I have known George Rhodes, Custer County Attorney, since he first started practicing law in this area. At the time he moved to Taylor, Nebraska to set up a private law practice, I was the Sheriff of Custer County. My first impression of Mr. Rhodes was that he was a young energetic attorney that seemed to be honest, sincere and tried to represent his client in a fair and respectable manner.

I resigned as Custer County Sheriff in May 1980 to start my own business and since then Mr. Rhodes has become County Attorney for Custer County. My fellow law enforcement officers, that I had worked with for years, seem to have an excellent repore and respect for Mr. Rhodes.

In January 1987, I was appointed District II Supervisor for Custer County and have had a chance to view [sic] Mr. Rhodes as a county attorney and county official from a countyboard viewpoint. Mr. Rhodes gives the countyboard excellent guidance [sic] and gives them legal opinions promptly. I believe George Rhodes is a dedicated public servant with the public's interest at heart.

As a county supervisor, a citizen, and a taxpayer, I would very much like to see George Rhodes remain our county attorney. In my eighteen years of law enforcement, I have worked with many prosecuting attorneys and I feel that Mr. Rhodes is doing an excellent job.

Mr. Rhodes is an elected official and I believe he also has a lot of public support.

Respectfully submitted,

/s/ Larry A. Hickenbottom
Larry A. Hickenbottom

BEREAN FUNDAMENTAL CHURCH

Pastor: Bryan Clark
604 South H Street, P.O. Box 27, Broken Bow, Nebraska
68822 308-872-6408

December 9, 1988

To: Disciplinary Review Board
Nebraska State Bar Association

Re: Charges against County Attorney, George Rhodes

I am writing this letter as a character reference for County Attorney, George Rhodes. I have known George

for several years and have been his Pastor for almost two years. I have been impressed with George's commitment to both his profession and our church. George is a man of conviction and utmost integrity. He rarely misses a Sunday service and is regularly involved in our Wednesday night youth program and a Tuesday night evangelism training program.

I have never known George to be anything but kind and courteous to others. When visiting about his profession, he has always treated his responsibilities as County Attorney with respect and hard work. It is not unusual to find George still in his office late into the evening hours.

Because I know George, I am convinced that the Review Board will find him to be a qualified and effective County Attorney. I am sorry that a man as dedicated and of such integrity has been accused in such a manner I thank God for men like George who uphold our laws with conviction and a moral conscience.

Respectfully Submitted,

/s/ Bryan Clark
Pastor Bryan Clark

9 December 1988

Disciplinary Review Board
Nebraska State Bar Association

Dear Sirs:

I served as Associate County Judge & Clerk Magistrate for Custer County from January 1973 until November, 1987.

I worked with George Rhodes on a daily basis for over seven years and in my opinion, he is a capable prosecutor [sic] and is a good county attorney. During the time I was Associate County Judge - Clerk Magistrate he always worked close with me and was always very courteous and accommodating to me.

George Rhodes is very dedicated to the office of County Attorney and the public he has been elected to serve. I would hate to see anything happen to George Rhodes that would put his position as Custer County Attorney in jeopardy in way [sic].

If there is any further information which you would like to have pertaining to this matter I will be glad to furnish it to the Review Board.

Yours very truly,

/s/ John T. Finney
John T. Finney
528 North 16th
Broken Bow, NE
68822

TRIAL EXHIBIT 62
MARIAN J. WOODWARD

Custer County Clerk
Court House
Broken Bow, Nebraska 68822

Phone No.
(308) 872-5701

May 23, 1988

Committee on Inquiry
Sixth District

Committee Members:

This letter is in reference to George Rhodes who I understand is the subject of this inquiry.

I have known George since he became our County Attorney in October, 1980.

Since I am the County Clerk, I have had many opportunities to assess his recommendations and work with the County Board of Supervisors. He is courteous, hardworking and professional in all that he does. He spends many extra hours in the evenings and on Saturdays in research.

I too, have had several instances where I have needed his advice as a County Official. He has been most helpful with these problems.

I believe him to be a man of high moral and Christian principles since I had a brief opportunity to discuss with him, his thoughts regarding the American Standard Version of the Bible which he studies and I like very much.

In my opinion, to flaw this man's professional career and character, would be a gross miscarriage of justice. We are in dire need of this type of person in the Judicial System

of our state and in public office. He is the best County Attorney this county has had since I started working here in January, 1971.

Thank you for your careful consideration of the above thoughts.

Sincerely,

/s/ Marian J. Woodward
Custer County Clerk

Office Of
COUNTY ASSESSOR
Custer County
Broken Bow, Nebraska

Leroy W. Schaad

Phone 872-2981

To: Committee on Inquiry

Subject: George Rhodes, Attorney at Law

As County Assessor of Custer County, I have many contacts with Mr. Rhodes as Custer County Attorney. When I need an opinion concerning the Revenue Statutes which affect my office, Mr. Rhodes is willing to take the time to research the Statutes before advising me.

Mr. Rhodes has represented Custer County in District Court and before the State Board of Equalization and Assessments. Mr. Rhodes has been very professional in handling our presentation before the Court and the State Board.

App. 105

Sincerely

/s/ Leroy W Schaad
Leroy W. Schaad
Custer County Assessor

Office Of
Custer County
HIGHWAY DEPARTMENT
HC-74, BOX 33A
Broken Bow, Nebraska 68822
May 22, 1988

Committee On Inquiry
6th District

Re: George Rhodes

To whom this may concern:

I am speaking for the office of Custer County Highway Department.

I have never went to George with a problem or a question concerning the County, that he hasn't always given me directions or did what was necessary to be done by his office, to keep things a moving, to serve the residents of the County.

Yours, truly,

/s/ Harry R Duryea
Harry R. Duryea
Custer County Highway
Supt.

Custer County
WEED CONTROL AUTHORITY
Max Bristol, Supt.

P.O. Box 83B Callaway Star Rt. Phone 872-2410,
Broken Bow, Nebraska 68822

Dear Sirs:

I have been working with Mr. George Rhodes for the past 4 years and he has done a very proffesional [sic] job on everything!

Thank you

/s/ Max C. Bristol, Supt.

JOSEPH J. DIVIS
Attorney at law
Brewster Nebr. 68821

(308) 547-2224
(308) 547-2234

May 24, 1988

Committee on Inquiry
Nebraska Bar Association
Sixth District

Reference: George Rhodes

Gentlemen:

Last week, after returning home from a rather serious and probably unsuccessful operation, I was informed that a hearing is scheduled before your committee pertaining to Mr. George Rhodes, Mr. Rhodes being the Custer County Attorney.

I then made inquiry, including, finally, inquiry of Mr. Rhodes as to the cause and nature of this hearing.

I was informed that the hearing would be held on May 26, and, generally, that the same had to do with allegations that Mr. Rhodes has been intimidating opposing defense counsel in his capacity as prosecutor, and, that, in his Complaints filed in criminal matters, he had brought excessive or unwarranted charges.

There appeared to be further allegations that Mr. Rhodes had, on occasion, carried, and kept in his office, firearms.

Since I have been County Attorney of Blaine County for a number of years, I have never defended against any of Mr. Rhodes's prosecutions.

However, for a number of years prior to his becoming Custer County Attorney, Mr. Rhodes defended clients being prosecuted in our county, and in each case, he conducted his defense with great zeal and vigor, and went all out in serving his clients, but, he did this in an honorable manner, and at no time, did he resort to unfair or reprehensible tactics.

As county attorney, he kept his zeal, directing the same vigor toward prosecution that he had directed toward defense.

Although, as I stated, I never defended in his county, our two counties join geographically, and on numerous occasions, we have had people such as thieves, burglars or check passers, who were subject to contemporaneous prosecution in both counties. At such times, I consulted with him, and at various other times, I have sought his opinion as to matters of law enforcement. I have also

attended trials of criminal matters in Custer County, when like offenses were pending in Blaine County.

At no time in my association with or observation of Mr. Rhodes, did he exhibit to my any inclination to threaten, bully or intimidate in any manner any opponent, in court or otherwise.

As defense counsel, he had strong convictions, and did not hesitate to express them during trial and sometimes in appealing, and he continued with this same zeal in his role as prosecutor, but never did Mr. Rhodes exhibit arrogance, make any personal attack, or in any way to prevail by unfair tactics.

In cases when Mr. Rhodes and I prosecuted the same parties for like offenses, I was never of the opinion that he allowed higher offenses than those he believed had been committed, and I try to be lenient, especially toward youths. At any rate, it would appear that such a practice should be curtailed in each instance by the Court, if not by defense counsel, and the prosecutor should not be intimidated.

As to firearms, Mr. Rhodes is interested in and collects firearms. So do I, but both he and I prosecute vigorously anyone who misuses a firearm. Mr. Rhodes was, during fairly recent times, threatened with being shot by an individual of apparently unbalanced mentality who made various attempts to purchase hand guns and ammunition for that purpose.

I believe Mr. Rhodes did on occasion arm himself during that period of time, as there was no way to keep the self-proclaimed assassin off the streets, and by his action,

possibly deterred his would-be assailant. He should not be punished for not being foolish, or for demonstrating to predators that it might be dangerous to threaten a prosecutor.

Over the past 38 years, on very rare occasions, I have found it necessary to adopt similar tactics and have found them to be effective, and we have had no violence or attempts to attack either prosecutor or judge in any of our criminal court proceedings.

In conclusion, in no way in any of my dealings with him or in any matters I have observed, did Mr. Rhodes use his position as county attorney either to enrich in any way, or benefit himself personally, or to personally pick on or hurt another person.

Mr. Rhodes made no request that I comment on the matter before you, nor did he furnish me with any specifics. I volunteered to write this letter, and am sending the same to him and he can choose whether or not to present the same to you for your consideration at the hearing on May 26.

Thanking you for your consideration, I remain, Sincerely,

/s/ Joseph J. Divis
Joseph J. Divis
(Blaine County Attorney)

Through: George Rhodes

TRIAL EXHIBIT 63
IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

MICHAEL J. BOWERS,	*
Attorney General of	*
Georgia,	*
Petitioner,	*
vs	* CIVIL ACTION
	* NO. 87-9032-2
THE STATE BAR OF GEORGIA,	*
and WILLIAM P. SMITH III,	*
General Counsel, State Bar	*
of Georgia,	*
Respondents.	*

FINAL JUDGMENT AND DECREE

This is an action for extraordinary relief, a Writ of Prohibition. The facts are not in dispute. The case arises out of a prior civil action before this Court, which the Attorney General initiated to restrain the State Personnel Board from conducting its business in sessions closed to the public. See: *The State of Georgia and Michael J. Bowers, Attorney General v. Richard Babush, et al.*, No. 87-5720-2 (DeKalb Superior Court). After a final ruling in that case, Susan Landrum, Chairperson of the State Personnel Board, filed a complaint with the State Bar of Georgia, alleging that the Attorney General breached various professional Standards of Conduct by suing the Board. The complaint was forwarded to the Investigative Panel of the State Bar Disciplinary Board for a probable cause hearing.

The Attorney General urged that the complaint be dismissed, claiming that the Canons of Ethics and the Standards of Conduct cannot be breached by a public servant in the fulfillment of his public duty. The Investigative Panel proceeded on the complaint. Cautiously treating the Attorney General as it must treat any private practitioner, the Panel concluded that probable cause existed to believe that the Attorney General had violated six of the legal profession's Standards of Conduct. The Attorney General then filed an action with the Supreme Court of Georgia asking for a Writ of Prohibition. The Supreme Court declined to exercise its original jurisdiction and dismissed the Attorney General's claim, indicating that the matter should be heard before a trial court. The Attorney General has since renewed his application for a Writ of Prohibition in the DeKalb Superior Court. As a preliminary matter, the Court expressly finds that subject matter jurisdiction is properly exercised by this Court, according to the directions of the Supreme Court. (See Petitioner's Exhibit D).

STATEMENT OF THE CASE

In an effort to vindicate the rights of the public, as established by the legislature in the Open Meetings Act (OCGA 50-14-1), the Attorney General felt constrained to initiate a civil action against the State Personnel Board. The Board is an agency of the Executive, and so the Attorney General has a duty to represent the Board and render opinions and advice. Ga. Const. Art. 5, Sec. 3, Par. IV. The question presented is whether, and to what extent, the Attorney General is subject to disciplinary proceedings before the State Bar for having brought suit

in his official capacity against a public agency which by law the Attorney General must represent.

CONCLUSIONS OF LAW

The Canons of Ethics and the Standards of Conduct are applicable to the Attorney General *only* insofar as they coincide with the rights and responsibilities of this public office. Furthermore, where a prerequisite to holding a constitutional office is membership in good standing with the State Bar, disciplinary proceedings may not be initiated against that public officer while he is in office, because the constitutional and statutory provisions for election, impeachment, removal, recall, and vacancy of office have superseded the watchdog role of the State Bar.

The position of the Attorney General is a constitutionally prescribed office. Ga. Const. Art. 5, Sec. 3, Par. I. As a public officer, the Attorney General is a trustee and servant of the people, for whose benefit representative government is constituted. Ga. Const. Art. 1, Sec. 2, Paragraphs I, II, and III. The duties of the Attorney General are specified at Art. 5, Sec. 3, Par. IV. Also, the General Assembly is authorized to define the duties of the office of the Attorney General. Art. 5, Sec. 3, Par. II. As enacted by the legislature, the duties of the Attorney General are variously defined at OCGA 45-15-1, *et seq.* OCGA 45-15-3 provides: —

It shall be the duty of the Attorney General:

- (1) When required to do so by the Governor, to give his opinion in writing, or otherwise, on any question of law connected with the

interest of the state, or with the duties of any of the departments;

- (2) When he deems it advisable, to prepare all contracts and writings in relation to any matter in which the State is interested;
- (3) When required to do so by the Governor, to participate in, on behalf of the state, all criminal actions in any court of competent jurisdiction when the district attorney thereof is being prosecuted, and all other criminal or civil action to which the state is a party;
- (4) To act as legal advisor to the executive branch;
- (5) To represent the state in all capital felony actions before the Supreme Court;
- (6) To represent the state in all civil actions tried in any court; and
- (7) To perform such other services as shall be required of him by law.

In addition, OCGA 45-15-10 authorizes the Attorney General to initiate criminal prosecutions against state officials who violate any criminal law while acting on behalf of the state, or its boards or agencies.

The Court concludes that the Attorney General was acting within his rights and responsibilities by initiating a civil action against the State Personnel Board in order to prevent an apparent violation of the Open Meetings Act. OCGA 45-15-3(6) does not limit the Attorney General merely to defending the state in all civil actions, nor does it require the Governor's authorization to commence a civil suit. This confers upon the Attorney General the discretionary authority and duty to pursue the state's

interest via a civil action. Moreover, since the basis for the civil suit against the Personnel Board was to prevent a violation of state law, the authority to bring a civil action must inhere in OCGA 45-15-10. By that code section, the Attorney General is empowered to prosecute state officials to induce compliance with state law. The great authority to achieve that result by indictment and prosecution must entail the discretion to employ less confrontational or intrusive methods, such as injunctive or declaratory relief. See, e.g., *Ramsey v. Hamilton*, 181 Ga. 365, at 369 (1935).

Clearly, then, public lawyers have duties and obligations which differ fundamentally from those incumbent upon private practitioners. The public lawyer has an overarching duty to seek a just result, whereas private counsel must zealously pursue a private claim or position within the bounds of the law. See, e.g., *Frazier v. The State*, (Slip opinion, Supreme court of Georgia, No. 44619, December 1, 1987), citing with approval ABA Formal Opinion 342, 62 ABAJ 517 at 522 (1976). The Code of Professional Responsibility in Georgia recognizes a distinction between private law firms and government lawyers. *Frazier*, at p. 8. The general rule is that public position does not permit a lawyer to ignore or to violate the Canons of Ethics. *Frazier*, pp 8-9. See, also, *Gordon v. Clinkscales*, 215 Ga. 843 (1960). *Clinkscales* posits a "good faith" or "scope of authority" defense to be raised at disciplinary hearings. While that may be the appropriate procedure for employees of the Law Department or for an Assistant District Attorney, the Court is of the opinion that a "scope of authority" defense is an inadequate protection for the constitutional officer who heads a team

of public lawyers. This is because the statutory posture of the Attorney General places him in a position where he must "represent multiple agencies within the executive branch. He may be compelled to prosecute any agency which by law he must represent. *Brown v. The State*, 177 Ga. App. 284 (1985). He might also represent two agencies which sue each other. The public duties of the Attorney General sometimes oblige him to disregard specific standards of conduct in an effort to be true to his superior oath, that of his public office.

The State Bar urges that it has jurisdiction to discipline the Attorney General who must be a member in good standing of the Bar as an ongoing qualification to holding his elective office. Ga. Const. Art. 5, Sec. 3, Par. 2. Rule 4-101 of the Rules and Regulations of the State Bar confers upon the State Bar the authority to punish any violation of the Standards of Conduct. The Bar correctly notes that there is nothing in the Rule of exempt the Attorney General from their application. Yet, suspension or disbarment of the Attorney General by the State Bar would result in a vacancy of the office, tantamount to impeachment or removal. This raises grave concerns as to the proper separation of powers under Ga. Const. Art. 1, Sec. 2, Par. 3.

The authority to impeach, suspend, or remove an elected official is properly exercised by the executive branch. Ga. Const. Art. 6, Sec. 8 Par. 2; *In re: Irvin*, 171 Ga. App. 794, Div. 2 at 797 (1984). It is this Court's opinion that to accord the State Bar removal power over elected officials, concurrent with the executive, is an impermissible intrusion by the judiciary on the authority of the executive. To permit the Bar to suspend or disbar the

Attorney General prior to any regulatory action by the proper executive authority would be in derogation of the franchise. The Court rules that the State Bar may not institute disciplinary proceedings against a constitutional officer who must be a member of the Bar as a qualification to hold office, while that officer is still in office. This is because the duty and authority of the Bar is superseded by the constitutional and statutory provisions for the election, impeachment, and removal of constitutional officers. Any vindication of the interests of the Bar in protecting the public from unqualified lawyers must wait until the political process is completed. The fear of disciplinary proceedings stemming from any act done under the color of public duty is too great an inhibition on the vigorous fulfillment of that duty. For this reason, the Court declines to fine tune the timing of disciplinary proceedings where the sanction is something less than suspension or disbarment. The better rule is a bright line.

REMEDIES

It is apparent to the Court that judges, Attorneys General, District Attorneys, and other public lawyers cannot be subject in all respects to the same rules and prohibitions as private practitioners, because of the special and higher duties of public office. Distinct Canons of Ethics already have been promulgated for the judiciary, and it follows that the professional obligations of public lawyers, actively practicing as public advocates, could withstand amplification and clarification. That duty, however, lies with the proper rulemaking authority, such as the Supreme Court or the legislature.

The Attorney General has petitioned for a Writ of Prohibition. The Writ has been held to be the proper remedy to restrain a State Bar Association from pursuing disciplinary action against a constitutional officer. See *Simpson v. Alabama State Bar*, 294 Ala. 52, 311 So.2d 307 (1975). The Writ is addressed to an inferior tribunal, and will lie to prevent that tribunal from exceeding its jurisdiction where no other legal remedy is available. OCGA 9-6-40. The Writ will not lie to redress a thing done, but only restrains a pending action or proceeding. *Martin v. Crawford*, 199 Ga. 497 (1945).

The State Bar is an administrative arm of the Supreme Court. When the Bar undertakes an investigation of attorney conduct by holding hearings, and making proposed findings of fact and conclusions of law, that entire process is an exercise of quasi-judicial authority. As such, the Court finds that the Bar is an inferior tribunal within the meaning of OCGA 9-6-40. Although the procedures of the investigation accord the respondent attorney the full panoply of due process protections, this is an inadequate remedy for the constitutional officer who is not subject to oversight by the Bar while he is still in office. Since the Court has rules that the Bar may not initiate disciplinary proceedings against a sitting or serving constitutional officer such as the Attorney General, the Court further concludes that the Bar would exceed its jurisdiction were it to proceed with the investigation by filing a formal complaint. Accordingly, the Writ of Prohibition must be, and hereby is, GRANTED. The State Bar is directed to refrain from proceeding on this complaint against the Attorney General. The Bar is further directed

to refrain from pursuing complaints against elected constitutional officers who must be members of the Bar, where the possibility of suspension or disbarment – whatever, the actual or intended sanction – would be the equivalent of impeachment, and thus a violation of the separation of powers.

In addition, because of the Court's ruling in this case, the probable cause finding reached by the Investigative Panel must be, and hereby is, VACATED.

The Writ of Prohibition is granted; the finding of probable cause is vacated.

SO ORDERED, this 23rd day of December, 1987.

/s/ Curtis v. Tillman
Curtis V. Tillman, Judge
Stone Mountain
Judicial Circuit.

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No. 90-241

Supreme Court, U.S.
FILED
AUG 23 1990
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**In The
Supreme Court of the United States
October Term, 1990**

GEORGE G. RHODES,

Petitioner,

vs.

**STATE OF NEBRASKA EX REL.
NEBRASKA STATE BAR ASSOCIATION,**

Respondent.

**On Petition For Writ Of
Certiorari From The Supreme Court Of The
State Of Nebraska**

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

In an attorney disciplinary proceeding, may a state supreme court impose a sanction of suspension from the practice of law against an elected county attorney for misconduct which is in violation of the Code of Professional Responsibility?

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STATE OF NEBRASKA EX REL.
NEBRASKA STATE BAR ASSOCIATION,

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On Petition For Writ Of
Certiorari From The Supreme Court Of The
State Of Nebraska

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

The State of Nebraska State ex rel. Nebraska Bar Association submits this brief in opposition to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This is an attorney disciplinary case. The Petitioner was suspended from the practice of law for a period of

three years by the Nebraska Supreme Court. (App. 1, Petition for Writ of Certiorari). At the time of his misconduct, the Petitioner was the elected County Attorney of Custer County, Nebraska.

As the County Attorney, the Petitioner filed a misdemeanor case of criminal mischief against a young man by the name of Speer. Petitioner had previously given expensive gifts to Speer.

During the pendency of the criminal case the Petitioner and Speer developed a close and personal relationship. They took two trips together and made arrangements for a trip to Vancouver. The Petitioner paid all expenses for these trips and continued to buy gifts for Speer. While the criminal case was pending, the Petitioner also offered to pay Speer's college expenses and car payments.

Despite this relationship, the Petitioner continued to prosecute Speer.

The criminal mischief case was eventually dismissed by the Petitioner. The next day the Petitioner and Speer left together on a trip to Vancouver. The Petitioner paid all of Speer's expenses.

After the Vancouver vacation, the Petitioner's relationship with Speer soured. The Petitioner wanted the relationship to continue. Speer wanted it to stop.

Approximately two months after the Vancouver trip, the Petitioner filed a felony burglary charge against Speer. The charge was based on the same police report which gave rise to the earlier criminal mischief case. This burglary charge was later dismissed by the Petitioner and

the Petitioner filed felony offenses of kidnapping and false imprisonment against Speer. The later two charges were based upon an incident unrelated to the alleged burglary.

The Petitioner eventually withdrew from the Speer prosecutions. The Petitioner then engaged in a series of bizarre and erratic behavior towards the special prosecutor and Speer.

The Petitioner appeared at a deposition with a 12-inch bayonet which was unrelated to the underlying case. He also took Speer's deposition and interrogated him as to their personal relationship. At this deposition, the Petitioner wore a mail-order policeman's uniform, a moot court medal and a loaded pistol. The Petitioner claimed that he was entitled to wear the uniform because he was the county coroner. The Petitioner also became physically aggressive towards the special prosecutor and continued to give expensive gifts to Speer.

The Nebraska Supreme Court, in a unanimous decision, concluded that the Petitioner had violated the Code of Professional Responsibility and that a suspension from the practice of law for three years was warranted. *State ex rel. NSBA v. Rhodes*, 234 Neb. 799, 453 N.W. 2d 73 (1990) (App. 1, Petition for Writ of Certiorari).

ARGUMENT

I.

THE PETITION SATISFIES NONE OF THE TRADITIONAL STANDARDS GOVERNING REVIEW OF CERTIORARI.

This is an attorney discipline case which has narrow applicability. The issues are primarily factual in nature and do not involve substantial federal questions.

The decision reached by the Nebraska Supreme Court is consistent with legal authority and does not conflict with prior decisions of this Court.

This case does not warrant the Court's review.

II.

THE CASE BELOW WAS CORRECTLY DECIDED.

The record demonstrates that an adequate factual basis exists for the suspension of the Petitioner from the practice of law and that the decision of the Nebraska Supreme Court was manifestly correct.

A great deal of the Petitioner's Writ is devoted to the argument that the Nebraska Supreme Court wrongfully found that he had a conflict of interest when he prosecuted his close friend. This issue does not involve a federal question.

The Petitioner claims that his conduct did not violate the Code of Professional Responsibility. He argues that at the time he prosecuted his close friend it was ethically permissible to do so.

The Disciplinary Rule which is in dispute is DR 5-101 (A) of the Code of Professional Responsibility. (App. 59, Petition for Writ of Certiorari). The Petitioner obviously violated this Code provision. Since DR 5-101 (A) was adopted long before he prosecuted his friend, the Petitioner's complaint regarding the application of this rule to his case is difficult to grasp.

The prohibition against a prosecuting attorney participating in a case in which the attorney's professional judgement may be affected by personal interests is well established. Contrary to the Petitioner's contentions, the prohibition is neither new nor novel. *People v. Nuzzi*, 128 Misc. 2d 502, 489 N.Y.S. 2d 836 (1985); *People v. Schrager*, 74 Misc. 833, 346 N.Y.S. 2d 101 (1973); *In the Matter of Ronald L. Davis*, 471 N.E. 2d 280 (Ind. 1984); *Kennedy v. L.D.*, 430 N.W. 2d 833 (Minn. 1988); *State v. Bell*, 84 Idaho 153, 370 P. 2d 508 (1962); and *People v. Doyle*, 159 Mich. App. 632, 406 N.W. 2d 893 (1987).

The Nebraska Supreme Court rightfully concluded that the Petitioner had violated the Code of Professional Responsibility. The Petitioner's claim that he did not violate the Code is totally without merit.

III.

THE PETITIONER WAS GIVEN ADEQUATE NOTICE OF THE ALLEGATIONS AGAINST HIM.

The Petitioner complains that he was not given adequate notice as to the nature of the allegations against him. An examination of the Formal Charges (App. 52, Petition for Writ of Certiorari) refutes this contention.

The Formal Charges consist of 39 detailed paragraphs describing the Petitioner's conduct. The provisions of the Code of Professional Responsibility which were violated by the Petitioner are specifically set forth in the Formal Charges.

The Petitioner received full and adequate notice of the allegations against him.

IV.

THE PETITIONER IS NOT IMMUNE FROM THE ATTORNEY DISCIPLINE SYSTEM ESTABLISHED BY THE NEBRASKA SUPREME COURT.

The Petitioner contends that he is immune from the attorney discipline system of the Nebraska Supreme Court as he was the elected County Attorney of Custer County, Nebraska at the time of his misconduct. This position is contrary to established law.

In Nebraska, the Supreme Court has inherent authority to regulate the conduct of attorneys. *In re Integration of the Nebraska State Bar Association*, 133 Neb. 283, 275 N.W. 265 (1937). In exercising this power, the Nebraska Supreme Court has held that public prosecutors are subject to sanctions for ethical misconduct. *State ex rel. NSBA v. Holscher*, 193 Neb. 729, 230 N.W. 2d 75 (1975); *State ex rel. NSBA v. Hollstein*, 202 Neb. 40, 274 N.W. 2d 508 (1979); *State ex rel. NSBA v. Gobel*, 201 Neb. 586, 271 N.W. 2d 41 (1978); *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W. 2d 515 (1987), appeal dismissed, cert. denied, 109 S. Ct. 31.

It has long been recognized in other jurisdictions that public prosecutors are not immune from disciplinary

prosecutions. *United States v. Kelly*, 550 F. Supp. 901 (D.C. Mass., 1982); *Price v. State Bar*, 30 Cal. 3d 537, 638 P. 2d 1311 (1982); *Re Conduct of Burrows*, 291 Or. 135, 629 P. 2d 820 (1981); *Re Wilson*, 76 Ariz. 49, 258 P. 2d 433 (1953); *Re Friedman*, 76 Ill. 2d 392, 392 N.E. 2d 1333; *Re Norris*, 60 Kan. 649, 57 P. 528 (1899); *Attorney Grievance Com. v. Green*, 278 Md. 412, 365 A. 2d 39 (1976); *Re Forbes*, 192 Minn. 544, 257 N.W. 329 (1934); *Re Graves*, 347 Mo. 49, 146 S.W. 2d 555 (1941); *Re Jelliff*, 271 N.W. 2d 588 (N.D. 1978); *Re Barnes*, 281 Or. 375, 574 P. 2d 657 (1978); *Re Rachmiel*, 90 N.J. 646, 449 A. 2d 505 (1982).

In a recent case, *Ramsey v. Tennessee Supreme Court Board of Professional Responsibility*, 771 S.W.2d 116 (Tenn. 1989) *cert. denied*, 110 S.Ct. 278 (1989), disciplinary authorities brought charges against an elected district attorney. The district attorney argued that the state constitution provided that impeachment was the exclusive method of removing him from office and that suspending him from the practice of law would be a violation of the separation of powers principles of the Tennessee and United States Constitutions. The Tennessee Supreme Court rejected the district attorney's argument and found that a suspension from the practice of law is not equivalent to an impeachment. The Court stated that one's status as a district attorney does not constitute a shield or protection to an attorney who violates his oath or the disciplinary rules.

The Petitioner's argument for immunity is based primarily upon an unpublished opinion of the Superior Court of Dekalb County, Georgia. His position is contrary to established law and does not warrant a review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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